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CIS

REVIEW OF AIRLINE DEREGULATION AND SUNSET OF THE CIVIL AERONAUTICS BOARD

(Government Regulation of Relationships Between Airlines and Travel Agents)

(98-27)

HEARINGS

BEFORE THE

SUBCOMMITTEE ON AVIATION

OF THE

COMMITTEE ON PUBLIC WORKS
AND TRANSPORTATION
HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

H.R. 2053

TO ASSURE THE CONTINUED PROTECTION OF THE TRAVELING PUBLIC IN THE MARKETING OF AIR TRANSPORTATION, AND FOR OTHER PURPOSES

JULY 26, 28; OCTOBER 20, 1983

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I

98TH CONGRESS
1ST SESSION

H. R. 2053

To assure the continued protection of the traveling public in the marketing of air transportation, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 10, 1983

Mr. ANDERSON (for himself, Mr. HOWARD, Mr. BONER of Tennessee, Mr. ROE, Mr. FLORIO, Mr. BADHAM, Mr. YOUNG of Missouri, Mr. SUNIA, Mr. DE LUGO, Mr. HEFTEL of Hawaii, Mr. DICKS, Mr. FORD of Tennessee, Mr. QUILLEN, and Mr. PASHAYAN) introduced the following bill; which was referred to the Committee on Public Works and Transportation

---

A BILL

To assure the continued protection of the traveling public in the marketing of air transportation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Air Travelers Security Act of 1983".

SEC. 2. The Federal Aviation Act of 1958 (49 U.S.C. 1301 et seq.) is amended by adding the following new sections at the end of title IV thereof:

CONGRESSIONAL DECLARATION OF POLICY

SEC. 420. The Congress hereby finds and declares—

(1) That the maintenance of competency, honesty, and efficiency in the marketing and sale of passenger air transportation is an important feature of the national integrated air transportation system which must be encouraged and preserved for the benefit of the traveling public.

(2) That mutual acceptance by air carriers and foreign air carriers of persons engaged as sales agents in the marketing and sale of passenger air transportation is necessary to maintain a nationwide network of qualified sales agents and requires cooperation and coordination among such carriers.

(3) That the national interest in air travel, consumer welfare, tourism promotion, professionalism, and financial stability in the marketing and sale of passenger air transportation requires continuation of carrier cooperative working arrangements as to assure that such goals are met.

(4) That it is in the public interest that carrier cooperative working arrangements for the marketing of passenger air transportation be subject to continuing administrative oversight with respect to compliance with the antitrust laws.

SEC. 421. The Board is directed to vacate Order 82-12-85, adopted December 16, 1982, and to adopt as its final decision in docket numbered 36595 the recommended order accompanying the initial decision of the administrative law judge therein, dated June 1, 1982.

○

REVIEW OF AIRLINE DEREGULATION AND SUNSET OF THE CIVIL AERONAUTICS BOARD

(Government Regulation of Relationships Between Airlines and Travel Agents)

TUESDAY, JULY 26, 1983

House of Representatives,
Subcommittee on Aviation,
Committee on Public Works and Transportation,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:08 a.m., in room 2167, Rayburn House Office Building, Hon. Norman Y. Mineta (chairman of the subcommittee) presiding.

Mr. Mineta. The Aviation Subcommittee will please come to order.

Today we are beginning hearings on the role of Government regulation in the relationships between airlines and travel agents. The main issue is whether there should continue to be antitrust immunity for the Air Traffic Conference [ATC] agreements which establish qualifications for travel agents and prescribe how the agents do business, and which prevent the airlines from using agents who do not operate in the prescribed manner.

In the Airline Deregulation Act of 1978, Congress changed the standards for granting antitrust immunity. Before the 1978 act, antitrust immunity attached automatically to any agreement approved by the Board. The 1978 act ended automatic immunity and required the Board to decide in each case whether it would be in the public interest for an airline agreement to be exempt from the antitrust laws. The Airline Deregulation Act provided that antitrust immunity would be awarded if the Board found that an agreement produced important public benefits which could not be accomplished by reasonably available alternatives which were materially less anticompetitive.

In light of these changes made by the 1978 act, CAB began a proceeding in 1979, the Competitive Marketing Investigation [CMI] to determine whether any changes were required in the Board's historic policy of granting antitrust immunity to the ATC agreements. The proceeding was completed in December 1982.

In its final decision, the Board recognized that travel agents have been playing a very important role in making deregulation work. With complex and rapidly changing airline fares, more and more passengers are relying on the expert counseling of travel agents. As a result, the number of travel agency locations has grown dramatically since deregulation; from 14,800 in 1978 to 22,000 today. The commissions received by agents have more than doubled: from $1 billion in 1978 to $2.2 billion in 1982. Even business travelers have come to rely increasingly on travel agent services. Business travel grew from 29 percent of travel agent sales in 1971 to 43 percent of sales in 1981.

The Board believes that its CMI decision is designed to enable the ATC travel agents to continue to play a leading role in the sale of air transportation. The Board concluded that this could be accomplished without antitrust immunity.

In reaching this decision, the Board found that the current ATC system has two essential elements. First, there is a system of common accreditation in which ATC reviews each agent's qualifications to insure that the agent is honest, competent, and financially responsible. This system saves each airline the expense of doing its own independent evaluation of the agents it uses.

A second essential element of the current system is the area settlement plan, which is a clearinghouse through which agents and airlines settle their accounts. This clearinghouse saves the extensive paperwork which would be required if an agent had to settle its accounts individually with each airline it represented.

The Board found in the CMI case that neither common accreditation nor the area settlement plan are inconsistent with the antitrust laws and therefore do not meet the statutory test of requiring antitrust immunity. The Board further concluded that in view of the benefits of common accreditation and the area settlement plan, the threat of frivolous antitrust suits should not discourage the airlines from continuing these agreements. In short, the Board found that requiring the airlines to conform to the antitrust laws would not destroy the main elements of the current system and the public benefits it produces.

The opponents of the Board's decision apparently disagree and feel that if airline-travel agent agreements are subject to the antitrust laws, the current system will collapse, and the public benefits it produces will be lost.

Another major element of the Board's decision involves exclusivity, in which the airlines agree that they will not use agents who do not comply with ATC rules including rules on how an agent does business. For example, ATC has rules requiring that tickets can be written only from offices which are open to the public 35 hours a week or more and which are staffed by managers with specified qualifications. Under exclusivity, each airline pledges not to use agents who operate in a different manner, such as an agent who wishes to be open only on weekends or in the evenings.

In their CMI decision, the Board decided that the airlines should not be permitted to agree collectively to use only agents who comply with ATC operating and other rules. The Board's decision does not prevent each airline from deciding voluntarily and unilaterally that it will deal only with ATC agents and the decision would not end the concept of ATC-accreditation for agents. However, under the Board's decision an airline is also free to use other agents who operate differently, if the airline wishes to do so.

In the Board's judgment, the valuable services provided by ATC agents mean that the airlines will continue to use them extensively. Here, too, the opponents of the Board's decision apparently disagree, and feel that continued antitrust immunity for exclusivity is required to preserve the current system.

In sum, the central issues dividing supporters and opponents of the CAB's decision are whether the U.S. Government should preserve agent exclusivity limiting ticket marketing to ATC-approved methods; and whether, in the absence of exclusivity, the main elements of the current system can survive without antitrust immunity. We look forward to receiving testimony on these and related issues which divide supporters and opponents of the CAB decision.

At this time, I am pleased to yield to my colleague from Arkansas, the very distinguished John Paul Hammerschmidt.

Mr. Hammerschmidt.

Mr. **Hammerschmidt**. Thank you, Mr. Chairman.

As you stated, today is the first of 3 days of hearings on the competitive marketing of air transportation and legislative proposals for continued regulation of that marketing system.

As my colleagues are well aware, the Airline Deregulation Act of 1978 was intended to free the airline industry from excessive economic regulation and insure the transition of that industry to a more competitive system. In response to that mandate, the CAB initiated its Competitive Marketing Investigation of the travel agent industry.

The CAB spent 3 years studying the competitive effects of the collective agreements which provide for the sale and distribution of airline tickets through the travel agency system—a system which sells approximately 60 percent of domestic airline seats, and about 80 percent of international seats.

Administrative Law Judge Ronnie Yoder essentially concluded that the current system of ticket sales and distribution through accredited agents should be preserved. However, in December 1982, the CAB adopted a final opinion which reversed Judge Yoder's decision. The CAB concluded that the so-called exclusivity clause was anticompetitive and that the collective agreements between the airlines and travel agents should face the same antitrust scrutiny as similar agreements in other industries.

Under serious consideration before this subcommittee is Congressman Anderson's bill, H.R. 2053, the Air Travelers Security Act. This legislation would reverse the CAB's recent decision and would retain the exclusivity provision, as well as preserve the grant of antitrust immunity which now applies to these agreements.

It is no secret that the administration is strongly opposed to H.R. 2053 on the grounds that it is contrary to the ideals of a free-market system, and many of our witnesses will be expressing similar views. However, I also firmly believe that we must have convincing and valid reasons for altering a system which has been so successful for the past 40 years. Moreover, we have an obligation to insure that the overall quality of ticketing services available to the traveling public will not be adversely affected by any changes in the current system of marketing.

Mr. Chairman, this is one of the more controversial issues to come before our subcommittee, and I decided many months ago that I would not take a position on H.R. 2053 until we had the opportunity to thoroughly examine both sides of this rather complex issue. Consequently, I look forward to these hearings and join the chairman in welcoming our witnesses who have taken the time to assist us in these deliberations.

Mr. Chairman, I would ask unanimous consent that at this point we be allowed to enter into the record a statement from the distinguished ranking minority member of the full committee, Mr. Gene Snyder.

[The statement of Mr. Snyder follows:]

STATEMENT OF HON. GENE SNYDER INTO THE COMPETITIVE MARKETING OF AIR TRANSPORTATION

Mr. Chairman: As you have indicated, these hearings will focus on one of the more controversial issues now pending before this subcommittee—that of the competitive marketing of air transportation. In the course of our inquiry, we will be examining the recent decisions of the CAB to eliminate travel agent exclusivity and antitrust immunity for these agreements, and whether or not the public interest would be best served by the adoption of legislation to overturn that decision.

As many of my colleagues are aware, the system which has been in place for approximately 40 years provides that, other than the airlines themselves, only accredited travel agents may sell airline tickets. This system of accreditation exists under agreements between air carriers who belong to the Air Traffic Conference [ATC] for Domestic Operations and to the International Air Transportation Association [IATA] for International Operations. The agreements have enjoyed CAB approval through the years as well as antitrust immunity pursuant to sections 412 and 414 of the Federal Aviation Act.

In 1979, the CAB instituted its competitive marketing investigation [CMI] to determine whether the public would be better served by allowing other potential marketers of air transportation to sell tickets—even if they were not accredited through the ATC or IATA.

After 3 years and thousands of pages of testimony and supporting documentation, Administrative Law Judge Ronnie Yoder decided that the current system should essentially be retained.

Six months later in December 1982, the CAB reversed Judge Yoder's decision and decided that the exclusivity provisions should not be approved. The Board ruling disapproved exclusivity immediately for on-line air transportation but decided to retain it for interline transportation until the end of 1984 when it would also remove antitrust immunity.

In the course of our inquiry, we will be examining both the law judge's and the CAB decision very closely. Obviously, this will also entail a discussion of Congressman Anderson's bill, H.R. 2053, which would retain travel agent exclusivity and antitrust immunity by substituting the ALJ's decision for that of the Board.

Mr. Chairman, it is no secret that the CMI has generated a substantial amount of interest throughout the entire air transportation industry. Since the beginning of this Congress, I have had the opportunity to discuss these issues with travel agents, CAB members, and other interested parties and I must say that there are persuasive points to be made on both sides of the question. During this time, I have intentionally remained neutral on the subject because I believed that these hearings would enable us to gain a better perspective on the key issues involved in the CMI.

I am particularly interested in hearing from the travel agent associations why they think the airlines should be precluded from experimenting with different forms of marketing if they perceive it to be in their best interests. On the other hand, I would like both CAB and others who endorse the Board's decision to explain why they feel that a system which has worked very well in the past should be tampered with—especially when over 21,000 travel agent locations are currently accredited and competing vigorously throughout the country.

Obviously, there will be many other questions for our witnesses and I am sure that many of the members are looking forward to exploring this matter in considerable detail.

For the foregoing reasons, I look forward to this week's hearings and would like to welcome all of the witnesses who will be assisting the subcommittee in its consideration of these important issues.

Mr. MINETA. We are pleased to have with us this morning U.S. Senator John Warner from Virginia; and U.S. Representatives, Hon. Bill Boner from Tennessee; Hon. Thomas Luken from Ohio; Hon. James Florio from New Jersey; and Hon. Glenn M. Anderson from California.

The full text of your prepared statements will appear in the record at this point.

[Statements referred to follow:]

TESTIMONY OF REPRESENTATIVE BILL BONER, CHAIRMAN, CONGRESSIONAL TRAVEL AND TOURISM CAUCUS

Chairman Mineta and members of the Committee, on behalf of the members of the Congressional Travel and Tourism Caucus, it is a pleasure to be here today to discuss an issue that could shape the way we utilize the service of the tourism industry in the future. The decision of The Civil Aeronautics Board in its competitive marketing investigation and its impact on the tourism industry is of utmost concern to the Travel and Tourism Caucus.

I would like to take time to note for the record the importance of the travel and tourism industry to the U.S. economy. In 1981, travel receipts made up over 6.5 percent of the U.S. Gross National Product. During that same year, it provided some 4.6 million jobs directly and another 2.2 million supporting jobs. The industry is comprised of nearly one million business establishments out of a total of 14 million in the U.S. and of those one million businesses, 99 percent are classified as small businesses. It is the first, second or third largest retail industry in at least 39 of the 50 states. It includes airlines, hotels, motels, attractions, rental car companies, bus and rail lines, cruise lines, convention and visitors bureaus, state government travel offices, food services establishments and many other enterprises providing services to travelers.

It is important to recognize that all of these diverse enterprises have one reason for existence—to provide services to travelers in preparation for and during trips away from home. One of the key elements that links these diverse groups together is the "travel agent." The travel agent provides the major suppliers of tourism services with a common retail outlet.

For the past 40 years, the travel agency system has served as an efficient and reliable network that provides quality service to consumers of transportation. The agency system, as we know it today, evolved over the course of years to meet the demands of the market place, while at the same time establishing credibility with the American traveller.

Prior to 1938, when the CAB permitted the airlines to establish joint agreements to implement a standard travel agency system, the public had no assurances that the tickets or services offered were valid, or that they would be provided as promised. The industry agency system created by these agreements has contributed to the ability of the industry to serve the public even during this confusing time of deregulation. The system allows ticket exchangeability, interline passenger and baggage exchange. The present system also allows for standards of professional competency and financial responsibility that travel agencies must meet. There are no strict barriers that prohibit companies from entering the market place. As a matter of fact, approximately five travel agencies open up every day.

In considering the competitive marketing case, the administrative law made recommendations that injected new competition into the industry, while preserving the essential elements of the agency distribution system. The judge's decision is clearly based on the evidence that was presented to the commission. It was based on the history of the travel agency business and on the lengthy hearing record that examined all facets of the travel industry.

On the other hand, the CAB's decision to override the administrative law judge does not appear to have been made on the basis of evidence that something was wrong with the present system. It appears instead that the Board based its decision on the basis of academic theory, that a free market will more efficiently provide travel services to the public. The Chairman of the CAB, however, has not shown that his decision offers a greater potential for new ideas.

Why should we take a system that is working, that is recognized as a credible and viable means of coordinating travel arrangements for the American public and throw it into turmoil? Mr. Chairman, The Travel and Tourism Caucus isn't just concerned about the effects of this decision on the travel agency system, or the travel industry, we feel it is vitally important to consider the ramifications and possible outcome of this decision on the consumer of these services. There are great risks involved in the CAB's decision and we must ask ourselves what is the responsible thing to do? The public has come to expect and receive satisfaction with the present system. The CAB's decision risks the trust of the public by allowing inexperienced non-professionals into the industry.

There is a need for a balanced, reasonable approach to preserve the public benefits of the travel agent market system. I don't think that there is any one here who doesn't recognize that if there were not certain regulations in this area, there could very easily be injustices, abuses and even fraud perpetrated on the traveling public. I believe there is a responsible role for government.

In contrast, I do not believe the CAB acted responsibly in making their decision. Had the members of the CAB devoted the time necessary to fully understand the complexity of this problem, I might feel differently. Mr. Chairman, I have raised in prior discussion with the Chairman of the CAB, and I would like to emphasize this point again today: I find it astounding that the members of the CAB would invest in the use of an administrative law judge, for the purpose of hearing the facts of the case and receiving testimony and yet would reject almost everything that the administrative law judge recommended. I do not believe the members devoted the time or research necessary to come to a thorough understanding of the consequences of their actions. Nor have they to date, presented testimony that supports the necessity of taking these drastic risks. If the CAB is to override all logic presented in some 40,000 pages of testimony, is it too much to ask: What are the specific benefits to be gained by the American public?

Mr. Chairman, I think we have something that works, a system that has not proven of disservice and certainly has not been challenged by a better or safety system. For those concerned about protecting the travelling public's consumer rights and promoting tourism as an industry employing 4.6 million Americans, The Air Traveler's Security Act is a vital piece of legislation.

In closing, I want to thank you for the opportunity to express the concerns of the Travel and Tourism Caucus and to speak in support of what we feel is a reasonable approach to avoid a sudden and disruptive change in a system that has proven its effectiveness and has worked in the public's best interest.

STATEMENT OF SENATOR JOHN W. WARNER

Thank you, Mr. Chairman, I appreciate the courtesy you have extended Senator Sasser and I, as the primary Senate sponsors of the Air Travelers Security Act, to testify before the Aviation Subcommittee on this very important travel and tourism, consumer rights legislation.

There are some critical issues surrounding this measure which I feel must be examined more fully. The general public and the parties interested in the outcome of this debate must have every opportunity to completely understand these issues. They are: (1) "Exclusivity", and (2) Antitrust immunity.

EXCLUSIVITY

The Air Transport Conference program contains three provisions which, collectively, have been termed "exclusivity." The word, "exclusivity," is potentially confusing because the Conference program does not exclude qualified travel agents, and there are no quotas or other inappropriate barriers to entry into the travel marketplace.

In his decision, the Civil Aeronautics Board's administrative law judge found that the program merely prevented non-accredited persons from acting as agents for Conference airlines. But the judge also found that the program should not bar people from having other relationships with the airlines.

Further, the CAB's administrative law judge determined that elimination of this recognition by the Conference of its agents would endanger the viability of the present worldwide transportation marketing system.

He determined that elimination of this recognition would undermine intercarrier confidence in the travel agent network and in the reliability of interlining, ticket interchangeability and refundability.

He determined elimination of this recognition would reduce the universality of carrier representation by travel agents; threaten the competence and professionalism of the travel agency industry as a whole; undermine consumer confidence in the competence, professionalism and universal representation of such agents; reduce consumer use of the travel agent marketing system and competition within it; and reduce the availability of travel agents representing all carriers providing consumers with complete and reliable information on all travel options.

Clearly, the Conference certifies travel agents for purposes of consumer conventionce and confidence. But if a consumer does not want to purchase travel accommodations through a travel agent, he or she has several other alternatives available.

The consumer can pick up the phone and shop from one airline to another until he or she finds just the right flight, at the right time and at the right price.

Or the consumer can go to a tour broker, purchase travel accommodations in a package, and obtain either regular schedule transport, or charter service.

Finally, a consumer can, in some areas of the country, buy airline tickets from automated dispensing machines representing a limited number of carriers, or directly from an airline ticket office.

As far as the travel agencies are concerned, as a competitive force in the marketplace there are over 22,000 of them.

Virtually all are small businesses with fewer than 10 employees. Over half of these agencies are owned by women, and as employers of minorities, travel agencies have one of the finest records of any enterprise in our nation.

The travel agency business grows by an average 1,000 new agencies a year. That's over 1,000 new entrepreneurs a year who enter the marketplace to make it or break it on their own, in competition with other travel agencies, in competition with every customer who chooses to take the time and effort to arrange their own travel, in competition with tour brokers, and in competition with the automated ticketing machines and airline ticket offices operated by the airlines themselves.

The only thing exclusive about a travel agent is that a travel agent is a promoting force in the marketplace and because of that, the airlines remunerate travel agents with commissions for the tickets they sell.

Other market forces, if they can demonstrate and are able negotiators in the free marketplace, also may obtain remuneration in the form of customer discounts, and other nonfinancial benefits.

So let's be perfectly frank, Mr. Chairman. Let's recognize once and for all that the term, "exclusivity," is nothing more than a smoke screen behind which certain interests are hiding in the hopes of radically changing the present marketing system so that they do not have to meet certification requirements.

The present marketing system is highly competitive. It affords the consumer confidence, convenience, and the broadest selection possible. It has evolved over the past 40 years . . . responding to the demands of the marketplace; doing so without complaint or objection from the traveling public or the industries it represents.

ANTITRUST IMMUNITY

Antitrust immunity is a very important aspect of the Air Travelers Security Act. It is, in my estimation, the cornerstone of the Air Transport Conference. Without it, I am convinced the Conference will be forced out of existence. The travel marketplace system—as we know it and as it is evolving during CAB sunsetting—will collapse, and in its place will come a highly decentralized, totally chaotic marketplace in which the battle cry will be "Buyer, beware."

Let me clarify one thing in light of this statement.

Supporters of this legislation are not anti-deregulation.

On the contrary, I believe I can safely speak for at least all of the Senate cosponsors of this legislation when I say, we believe that Congress made the right decision, and we would not for a moment attempt to re-regulate the airlines industry.

And that, Mr. Chairman, is why we are so amazed by the CAB's split decision to strip the Conference of its immunity effective January 1, 1985.

With the protection of immunity, the Conference will be able to act, as we believe the present administration would desire, and as we believe Congress intended after CAB sunset, as the industry's self-regulating mechanism.

The Conference would be capable to seeking the continued cooperation of industry members and agents, ensuring that the consumer continues to enjoy the best possible service in the most universal fashion obtainable.

And the Conference could do that free of government interference . . . but only if the Conference continues to have antitrust immunity.

Without antitrust immunity, the Conference would be forced into the regulatory environment of the courts and the U.S. Justice Department.

The CAB itself, in its order instituting the Competitive Marketing Investigation, recognized the importance of antitrust immunity, and wrote: "Without immunity . . . it is likely that neither the IATA (International Air Transport Association) nor the ATC (Air Transport Conference) conference systems could have been developed."

In the course of the Congressional debate, as they did during the CAB's debate on this issue, the few opponents of the present system have publicly attempted to downplay the importance of the antitrust aspects of the Conference agreements.

But, for the airline members of the Conference, antitrust litigation would spell continued, deep financial hardship, especially during these times when the airlines are not in strong financial condition.

For the travel agencies, antitrust litigation could spell bankruptcy, especially since most of them are only small businesses, and many are barely able to meet their day to day expenses, let alone the cost of prolonged and expensive antitrust law suits.

And for everyone else who, at this time, thinks the way to attain a more rewarding financial relationship with the airlines is by stripping the Conference of its antitrust immunity, that kind of litigation can only spell higher cost air travel and a higher cost of doing business.

Mr. Chairman, the antitrust aspects of this legislation go far beyond simply the working relationships of the airlines with one another and the travel agents with the airlines.

The antitrust aspects of this issue go to the heart of the consumers' ability to have a meaningful choice and the consumers' ability to shop with confidence in the travel marketingplace.

The antitrust aspects of this issue affect all forms of accommodation in the travel and tourism industry, and they affect the millions of persons who not only consume, but who are employed throughout the industry.

That is why, almost without exception, people who understand the agency-carrier system believe it should remain intact.

The system relies heavily on collective agreements, on common rules and standards. But without immunity, these agreements and standards are strongly disfavored by the federal antitrust courts. Therefore, the system must receive antitrust immunity if it is to continue.

A final point, Mr. Chairman, from a foreign relations perspective. The State Department advised the CAB that without antitrust immunity, foreign governments which participate in bilateral agreements for the marketing of air travel would consider those agreements as empty gestures, tantamount to disapproval.

At a time when international tensions are so high, and our balance of payments is so distorted, it seems to me we ought to be doing more to encourage international travel . . . the understandings and commerce it generates . . . rather than discouraging it. The Air Travelers Security Act would help achieve that goal.

In the end, Mr. Chairman, it is the consumer who has the most at stake here.

The choice is for Congress, it seems to me, are quite clear.

It is the will of Congress to allow the present, highly competitive, extremely adaptable, totally consumer oriented travel marketing system to continue . . . protected as it must be by antitrust immunity to insure that when a consumer chooses to use a travel agent that agent is indeed a bona fide representative for all travel accommodations?

Or is it the will of Congress to destroy the present, highly competitive, extremely adaptable, totally consumer oriented travel marketing system . . . subjecting the consumer to unnecessary risk, fraud, chaos, and inconvenience; subjecting member firms of the travel industry to unnecessary and arbitrary litigation and the inherent costs involved?

Mr. Chairman, there is an old adage: "If it ain't broke, don't fix it."

The present system certainly is not broken. It serves the public interest efficiently and effectively while promoting unlimited competiton.

If Congress accepts the CAB's fix, neither the public's interest, nor the interests of the very few who oppose our legislation will be served.

I urge support of the Air Travelers Security Act of 1983.

STATEMENT OF CONGRESSMAN THOMAS A. LUKEN

Mr. Chairman and members of the subcommittee, I appreciate very much having the opportunity to share with you today my thoughts regarding government regulation of the travel agency system. As Chairman of the Subcommittee on Antitrust and Restraint of Trade Activities Affecting Small Business, I have had the opportunity to review the matters you have under consideration in some detail. Our Subcommittee has examined the marketing system for air transportation in the wake of the Civil Aeronautic Board's December, 1982 decision. On May 24 we held a hearing at which testimony was given by both government and public witnesses.

Most of the operating travel agencies today are classified as small businesses. This industry does provide opportunity for both minorities and women to break into the business world and compete for business. Over 46 percent of the agencies are owned by women today. Our Subcommittee looked into the air transportation marketing system because of our concern about potential damage to a small business success story.

As a Subcommittee Chairman with antitrust responsibilities I take a very careful look at proposed changes in the application of the nation's basic antitrust statutes. The Potential for litigation is great, and the costs of such actions can be enormous.

Sections 412 and 414 of the Federal Aviation Act grant the CAB the authority to approve air conference agreements and provide immunity from antitrust laws. Our Subcommittee was particularly interested in reviewing the decision of the Board to deny immunity for conference agreements starting in 1985.

Some of the witnesses before our Subcommittee called the travel agency system a monopoly. Yet there is a great deal of growth in the industry. The CAB's own statistics show a 10 percent increase per year in the number of agencies during the decade of the seventies. There are now over 20,000 agency locations in the United States, and as I indicated before, opportunities for women and minorities are significant. Thus, the Agency system does not show the classic barriers to entry necessary to support charges of monopoly.

In our examination of the issue of competition, we found that almost all observers, including the CAB, agree that the agency system fosters competition within the airline industry by making easier entry for carriers. A new entrant would not have to make a large investment in a sales force if the people are already there through the agency system. Any expected benefit from the competitive marketing case must be weighed against the potential risk of losing this ready-made sales force.

The significant policy choice today for Congress is no longer between the air traffic agreements as they existed prior to December, and the decision of the CAB, but rather the choice is largely between Administrative Law Judge Yoder's findings and the CAB position. No party of which I am aware would ask at this time for a return to "exclusivity" as it was know prior to the CAB's actions on this matter. Under the Yoder decision, companies like Ticketron would be permitted to market airline tickets. This will provide competition in the industry in addition to the full service agencies. Congressman Anderson's bill, H.R. 2053, embodies that Administrative Law Judge's decision.

In judging whether to remove antitrust immunity from the Air Traffic Conference Programs then, the question really becomes one of weighing the potential advantages of the programs envisioned by the CAB as a result of the Board's decision, against the risk that the loss of antitrust immunity could threaten the agency system. In determining the advantages of ending antitrust immunity, it is essential to compare the system that would then emerge against the system that would exist under the Yoder decision.

Pressed to explain what benefits could be gained under the Board's decision, Chairman McKinnon could only cite "opportunity." He could not cite specific benefits that would not otherwise accrue under the Yoder Recommendations.

In fact, I cannot find evidence in the record that would demonstrate any significant benefits for the public in terms of price or service under the CAB order that would not also be available under Yoder.

In conclusion, I just don't believe that we ought to be trying to fix something that's not broken. All parties agree, with the possible exception of the business travel departments, that the current system works well to foster competition and serve the public. The loss of antitrust immunity could expose agencies and carriers to lawsuits which jeopardize continuation of the system. In order to justify taking that risk, I believe it is incumbent on us to demonstrate a significant public benefit. Until that benefit can be delineated, I remain convinced we should support a system that has served us well for more than 40 years. That's why I'm supporting Mr. Anderson's legislation.

STATEMENT OF HON. JAMES J. FLORIO, CHAIRMAN, SUBCOMMITTEE ON COMMERCE, TRANSPORTATION AND TOURISM

Mr. Chairman, I want to thank you for this opportunity to testify on the changes which are occurring in the travel industry as a result of airline deregulation. Today, I would like to address my remarks to the impact of last year's Civil Aeronautics Board decision on the travel industry generally.

Mr. Chairman, at the outset, I think it is important to remember that airline deregulation came about for two very important reasons: to instill competition in the provision of air transportation services; and to provide such services in the most efficient manner. In my view, only those actions that are consistent with these purposes should be taken in the name of airline deregulation.

It is this standard, therefore, which I believe we must use in analyzing the implications of the CAB's decision last December in the competitive marketing case. Will that decision lead to greater competitiveness and efficiency in the marketing of air transportation services?

As the Chairman of the Subcommittee which has jurisdiction over tourism, I have more than a casual interest in how this decision will affect the travel and tourism industry. I also recognize the fact that the "good" reasons which prompt a public decision of this type may seem less important, or even incorrect, as time passes and those affected by such decisions have an opportunity to react.

Mr. Chairman, I think this pretty much describes how I view the CAB's recent decision in this case. For what at the time, seemed to be "good" reasons, the CAB decided to permit anti-trust immunity to expire at the end of December, 1984 for the way the Air Traffic Conference of American and the International Air Transport Association go about selling tickets through travel agents.

And, what were these "good" reasons? It is clear from looking at the decision that the CAB did not intend to destroy the current system under which airline tickets are marketed in the United States.

On the contrary, in reaching its decision, the Board stated clearly that the current system had many benefits for both the airline industry and consumers of airline transportation. Furthermore, the Board asserted its belief that most aspects of the current system would not be harmed by the loss of anti-trust immunity. Thus, it seems clear that the Board decided to permit anti-trust immunity to expire not in order to bring down the current system of marketing airline tickets, but instead because they believed the current system does not require anti-trust immunity to operate efficiently.

As you know, the Board's decision overruled the administrative law judge's finding in the case and was quite complicated. The reaction from those affected, therefore, was delayed and at first, unclear.

That reaction has now solidified and become very clear. Despite the Board's claim to the contrary, it now is very clear that, in fact, the current system of marketing airline transportation in this country cannot stand without anti-trust immunity.

There can be really no other conclusion drawn when you look at who will be coming before this Subcommittee during these hearings in support of legislation to overturn the CAB decision. Virtually every major organization representing the travel and tourism industry has come out in opposition to the Board's ruling.

Perhaps most important is the Airline Transport Association's opposition. This association represents the 30 major airlines operating in the U.S. It is these airlines that would have to make the ultimate decision as to whether they would continue their current method of operation without anti-trust immunity. Their judgment is that business as usual could not continue, and on that basis, I have joined with 111 other Members of the House in supporting the bill H.R. 2053, the Air Travelers Security Act of 1983.

Under this legislation, anti-trust immunity would be extended for the joint accreditation of travel agents and the associated Area Settlement Plan, through which agents and airlines settle accounts for tickets purchased through agents. Anti-trust immunity would not be extended to so-called "exclusivity" requirements which require airlines to deal only with accredited agents.

Mr. Chairman, at this time I would like to take a moment to discuss what I believe to be a very unfair criticism that some have made against this bill. The charge has been made that this bill is designed to "protect" travel agents or to ensure them business which otherwise they would not get.

While I fully acknowledge that there is an element of protection involved in this legislation, I believe it is the public, not the travel agent, that is the object of that protection. For example, without a common ticket stock as the current system uses, a seller of airline tickets is necessarily limited in what it can offer the air traveler. Such restrictions can only limit the choice available to the consumer and the ability of providers of airline tickets to serve the traveling public.

These and many similar problems would result if the Board's decision is permitted to stand. I, therefore, urge your Subcommittee to take favorable action on H.R. 2053.

Mr. MINETA. Please proceed.

TESTIMONY OF HON. JOHN W. WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA; HON. WILLIAM H. BONER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE; HON. THOMAS A. LUKEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO; HON. JAMES J. FLORIO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY; AND HON. GLENN M. ANDERSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Senator **Warner**. Mr. Chairman, I am deeply grateful to be allowed to precede the others, but I think in deference I would defer to my colleague here in the House. Then I would follow him, if that is agreeable to the Chair, just out of respect and protocol.

Mr. **Mineta**. We are pleased to have this morning our own distinguished Member, former chairman of the Aviation Subcommittee, chairman of the Surface Transportation Subcommittee, the Honorable Glenn Anderson.

Mr. **Anderson**. Thank you, Mr. Chairman. Thank you, Senator Warner, for your courtesy.

At the outset, Mr. Chairman, let me commend you for scheduling these hearings in which we will discuss the CAB's competitive marketing case decision and my proposal, H.R. 2053, the Air Travelers Security Act of 1983.

As the former chairman of this subcommittee, I can well understand and appreciate the multitude of issues and problems you face in helping to strengthen the many facets of the aviation industry. Whether it be airport development, cabin safety or a host of other topics, the issues which confront us should be carefully reviewed in order to insure the continued protection of the air traveler. Your efforts in this behalf have not gone unnoticed, and I just want to publicly let you know that you have done an outstanding job as chairman of this subcommittee.

Today, we will begin to take a closer look at how and why the CAB came to its decision in what has evolved to be known as the competitive marketing investigation. I look forward to hearing from our good friend Dan McKinnon, Chairman of the CAB, as well as others in the airline and travel industry.

Mr. Chairman, as you know, the year following airline deregulation, the CAB took it upon itself to consider and study the then-current structure of the marketing system for air transportation in the United States. The CAB order which initiated this study recognized that sales of air transportation have been made primarily by airlines and their authorized agents for over 40 years under agreements among most of the major airlines in this country—as members of the Air Transport Association and Air Traffic Conference—and throughout the world as members of the International Air Transport Association.

After 3 years and over 40,000 pages of testimony, CAB Administrative Law Judge Ronnie Yoder issued his recommended order in June 1982, which retained the basic framework of the airline ticket distribution system. This interrelated system consisted of voluntary agreements between carriers, with standards for the utilization of common agents. Specifically, Judge Yoder concluded that, "* * * the public interest can be served only if that system is preserved."

Six months later, however, the CAB overturned this recommended order. Those who subscribe to this decision often use buzz words or cliche-ridden phrases to describe the CAB's action. Statements such as "free competition," "special treatment of travel agents," "protectionism," or "monopoly" often catch our eye in the many trade tabloids when the competitive marketing investigation is discussed.

To me, this is a distortion of what the issue really means. As a member of the Public Works and Transportation Committee for 15 years, I have been directly involved in numerous debates to deregulate the various segments of the transportation industry. As you know, I authored the Airline Deregulation Act of 1978; was the principal architect of legislation to deregulate the air cargo industry and international aviation; and, in the end, supported truck and rail deregulation. Most recently, the President signed into law my bill to deregulate the intercity bus industry.

My record over the years clearly illustrates that I am an ardent supporter of deregulating American industry. Thus, I am somewhat astonished when it is stated that I favor reregulation or protectionist measures.

I do believe, however, that there are legitimate functions of the Federal Government in business. Among these is the oversight of the airline ticket distribution system.

Because of the time constraints we are under, I will not discuss any further specifics on the issue at this time. I am sure that we will have plenty of opportunities today and on Thursday—and even an opportunity in the fall—to discuss the impact of this CAB decision more indepth and get some answers to our many questions.

In closing, let me just point out that the marketing system of air transportation in this country has served the public and the carriers well, over the past four decades. At the same time, however, I do not subscribe to the notion that we should block innovative and alternative marketing ideas to the system. H.R. 2053 would not suppress these new ideas. It would, however, insure the continued integrity of the system.

In an attempt to preserve this system, I, along with well over 100 of our colleagues, have sponsored H.R. 2053. Identical legislation has been introduced in the Senate by our friend, the senior Senator from Virginia, John Warner. Both bills have generated bipartisan cooperation among the Members and have been endorsed by almost the entire travel and tourism industry and should be adopted as soon as possible.

I am delighted to welcome Senators Warner and Sasser, cochairmen of the Senate Tourism Caucus. I believe Senator Sasser just stepped out. Also, Congressman Tom Luken, chairman of the Small Business Subcommittee on Antitrust and Restraint of Trade Activities Affecting Small Business, who, by the way, held a hearing on this subject on May 23 and, the following day, cosponsored H.R. 2053.

I also welcome back to our subcommittee the Honorable Bill Boner, who introduced legislation on this issue in the 97th Congress and is currently serving as Chairman of the U.S. Congressional Travel and Tourism Caucus. Also, last but certainly not least, I welcome Representative Jim Florio, chairman of the Energy and

Commerce Subcommittee on Commerce, Transportation and Tourism.

This concludes my statement, Mr. Chairman, and I would now like to yield back to Senator Warner.

Senator WARNER. Thank you very much, Mr. Chairman.

I am indeed privileged to be associated with so many distinguished Members of the House, and the chairman, in working on this piece of legislation. My distinguished colleague from Tennessee, Mr. Sasser, who shares with me the position of cochairman of the Senate Tourism Caucus, was here momentarily. I do hope that he will reappear and participate in this hearing.

Because your schedule is full today, I will summarize my remarks.

There are two very important issues associated with the Air Travelers Security Act, which I believe deserve more discussion and public understanding. They are exclusivity and antitrust immunity.

The Air Traffic Conference program contains three provisions which collectively have been termed "exclusivity." That is confusing because the program does not exclude qualified travel agents, and there are no quotas or other inappropriate barriers to entry into the travel marketplace. The program merely prevents nonaccredited persons from acting as agents for conference airlines.

Without this recognition of the conference agents, the viability of the present worldwide transportation marketing system would be jeopardized.

In the carrier conference, the travel agent network and the reliability of interlining arrangements would be jeopardized.

The universality of carrier representation would be jeopardized.

The availability of interlining ticket interchange ability and refundability would be jeopardized.

The competence and professionalism of the travel agency industry would be jeopardized.

And consumer confidence in the travel agent marketing system and competition within the total travel marketplace would be jeopardized.

Clearly, the conference certifies travel agents for the purpose of consumer convenience and confidence. But if a consumer does not want to purchase travel accommodations through a travel agent, he or she has several alternatives available. First and foremost, the consumer has a phone. He or she can shop from one airline to another until they find the right flight at the right time at the right price. Or a consumer can go to a travel broker. Or a consumer can, in some areas of the country, buy air travel from a vendor like Ticketron. Or a consumer can go to an airline ticket office.

As for the travel agencies themselves, they, too, are highly competitive. There are more than 22,000 of them across the Nation. Virtually all of them are small businesses. Over half of them are owned and operated by women. Every year, an average of 1,000 new agencies open. That is 1,000 new entrepreneurs in the marketplace who compete with each other, with the consumer, with the independent vendors and with the airlines. The only exclusive element of travel agencies is that they receive a commission while other entities in the market are free to negotiate discounts and other nonfinancial benefits from the airlines.

Frankly, Mr. Chairman, this term "exclusivity" is nothing more than a smoke screen behind which certain interests are hiding in the hopes of undermining the present highly competitive travel marketplace with all the consumer confidence and convenience it has fostered over the past 40 years.

Now, turning to antitrust immunity.

Antitrust immunity is a very important aspect of the Air Travelers Security Act. It is the cornerstone of the Air Traffic Conference. Without it, I am convinced the conference will be forced out of existence; the travel marketing system will collapse. In its place will come a highly decentralized totally chaotic marketplace in which the battle cry will be, indeed, buyer beware.

Mr. Chairman, supporters of this legislation are for the most part deregulation advocates. As a matter of fact, I just left the Senate Commerce Committee, where I testified on the Staggers Rail Act. I was a member of that committee when we passed a number of Deregulation Acts. Proponents of the Air Travelers Security Act were amazed by the commission's split decision to strip the conference of its antitrust immunity effective January 1, 1985.

The conference is the industry's self-regulating mechanism. Without antitrust immunity, the conference would be forced into the regulatory environment of the courts and the U.S. Justice Department. It would be litigated endlessly and capriciously by whomever and wherever the cases may be brought.

Mr. Chairman, there are some who have attempted to downplay the significance of the antitrust aspects of this issue. It is not a matter to be downplayed.

The briefs filed during the competitive market investigation and statements of intention by the opponents of this legislation, make it clear that once the conference is stripped of its antitrust immunity, the conference and everyone associated with it will be faced with a barrage of antitrust lawsuits aimed at destroying the present travel marketplace.

In conclusion, in that environment there will be no winners; only losers. Not the airlines, not the travel agents, not the deregulatory theorists, not the taxpayers and certainly not the consumers.

That is why almost without exception, people who understand the agency carrier system believe it should remain intact. That system relies heavily on collective agreements, on common rules and standards. Those standards by their nature require antitrust immunity.

A final point: The State Department advised the CAB that the bilateral marketing agreements that the United States has with other nations for marketing of air travel require antitrust immunity. Without that immunity, foreign governments would consider our agreements disapproved. At a time when there is such a need for better international understanding and improved world trade, it seems to me we ought to be doing more, not less, to encourage world travel. The Air Travelers Security Act helps us achieve that goal.

There is an old adage, Mr. Chairman: If it ain't broke, don't fix it. The present system is not broke. It serves the public interest extremely well while it promotes unlimited competition. If Congress accepts the CAB's fix, neither the public interest, nor the interests of the very few who oppose our legislation will be served.

I urge you to support the Air Travelers Security Act. And thank you for the courtesy extended me today, Mr. Chairman, by yourself, members of the committee and my fellow witnesses.

Thank you, Mr. Chairman. I must depart.

Mr. MINETA. Thank you very much, Senator Warner.

Without objection the statement of Senator Sasser of Tennessee will be submitted for the record.

[The statement of Senator Sasser follows:]

STATEMENT OF SENATOR JIM SASSER, COCHAIRMAN, U.S. SENATE TOURISM CAUCUS

Mr. Chairman, I want to thank you for this opportunity to discuss, along with Senator Warner—with whom I co-chair the Senate Tourism Caucus, my views on H.R. 2053.

I suppose I could sum up what I have to say, Mr. Chairman, by posing as a question the title of a popular song of the 1960s, "Do You Know The Way to San Jose?"

I am sure that you do, But someone from my home state of Tennessee probably wouldn't know. They would probably contact their local travel agent in order to learn the quickest way. Likewise, the people from your home district in San Jose would probably have to contact their travel agent if they wanted to visit the "Home of the Blues" on Beale Street in Memphis or the Grand Ol' Opry in Nashville.

The problem is this: the ability of people to find the way to San Jose, or to Memhis, or to Nashville, is going to be seriously threatened come January 1984—if we don't set aside last year's narrow CAB decision. H.R. 2053 would do just that, vacate that decision and provide immunity for the current relationship between travel agents and the airline industry.

Other witnesses this morning will more than cover the many arguments related to H.R. 2053 and its Senate companion, S. 764. My brief remarks focus on what I believe will be the outcome . . . if immunity from antitrust statutes is not maintained for the Air Transport Conference.

Let's take the precedent of so-called deregulations. I supported deregulation of the airline industry and the sunset of the Civil Aeronautics Board. I had hoped that deregulation would encourage a healthy competition among carriers. I had hope that short-haul carriers would fill in on those routes that were less-than-lucrative for major airlines.

That's what I had hoped. What we got was a suicidal rate war among the airlines in which cut-rate prices made it attractive to go from Washington to Miami . . . but both costly and inconvenient to go from Washington to Chattanooga; a rate war that contributed to the demise of Braniff airlines; a rate war that still threatens the basic stability of the industry.

No one in the Congress really wants to regulate once again the routes or rate structures of airlines. But there is strong sentiment toward that direction . . . unless the airlines can exercise restraint and common sense on their own.

That kind of industry self-restraint, that kind of working and workable arrangement, is already in operation in the relationship among travel agents and the airlines. I say: let it continue to work.

The last thing we need it another episode of suicidal competition among airlines and travel agents. But I submit that this is exactly what could happen should the CAB ruling be allowed to stand.

I am concerned, too, about the economic impact to my state should the CAB decision be effected.

The more than 1,000 people working at travel agencies in Tennessee were responsible last year for $195 million in airline bookings. The payroll derived from booking commissions and the tax revenues these agencies generated for federal, state and local governments represent scores of millions more in positive economic impact for our state.

So, it comes down to this: common sense tells us it would be illogical not to act on the CAB ruling; economic sense tells us it would be too costly not to act.

I therefore urge this subcommittee to act, and to act favorably and quickly on H.R. 2053.

Mr. MINETA. At this time, I would like to call on our colleague from New Jersey, Mr. Florio, who chairs the Subcommittee on Commerce, Transportation and Tourism.

Mr. Florio.

Mr. FLORIO. Thank you, Mr. Chairman.

In the interest of conserving the committee's time, I will summarize my prepared statement, which has been received for the record.

I think it is important to remember that airline deregulation came about for two very important reasons: to instill competition in the provision of air transportation services and to provide such services in the most efficient manner. In my view, only those actions that are consistent with these purposes should be taken in the name of airline deregulation.

It is this standard, therefore, which I believe we must use in analyzing the implications of the CAB's decision last December in the competitive marketing case. Will that decision lead to greater competitiveness and efficiency in the marketing of air transportation services?

As the chairman of the subcommittee which has jurisdiction over tourism, I have more than a casual interest in how this decision will affect the travel and tourism industry. I also recognize the fact that what might have appeared as a good reason for making this decision, upon reflection might not be as persuasive, now that we have had some time to analyze the impact of this decision.

I think it is important to realize that the good reasons that were put forward by the CAB when they made their decision included in those good reasons the belief that the existing system did not require antitrust immunity. As we look at that, I think the conclusion is now starting to be floated out; the existing system requires antitrust immunity. Without that immunity, the existing system is not going to be able to be maintained.

As I said, the Board clearly stated that the current system had many benefits for both the airline industry and consumers of airline transportation. Furthermore, the Board asserted its belief that most aspects of the current system would not be harmed by the loss of antitrust immunity. Thus, it seems clear that the Board decided to permit antitrust immunity to expire not in order to bring down the current system of marketing airline tickets, but instead because they believed the current system does not require antitrust immunity to operate efficiently.

As you know, the Board's decision overruled the administrative law judge's finding in the case and was quite complicated. The reaction from those affected, therefore, was delayed and, at first, unclear.

That reaction has now solidified and become very clear. Despite the Board's claim to the contrary, it now is very clear that, in fact, the current system of marketing airline transportation in this country cannot stand without antitrust immunity.

There can be really no other conclusion. You will be hearing from witnesses today, but suffice it to say that every major organization representing the travel and tourism industry has come out in opposition to the Board's ruling. Perhaps the most important is the Airline Transportation Association's opposition. This association, as you know, represents the 30 major airlines operating in the United States. It is these airlines that would have to make the ultimate decision as to whether they would continue their current method of operation without antitrust immunity. Their judgment is that business as usual could not continue. And on that basis, with their recommendation, I have joined with 111 other Members of the House in supporting the bill that is the subject of these hearings.

Under this legislation, antitrust immunity would be extended for the joint accreditation of travel agents and the Associated Area Settlement plan, through which agents and airlines settle accounts for tickets purchased through agents. Antitrust immunity would not be extended to so-called "exclusivity" requirements which require airlines to deal only with accredited agents.

Mr. Chairman, I think it is also important to address the concerns some have expressed with regard to protection. I think the protection that is inherent in Mr. Anderson's bill is protection for consumers, consumers of airline ticket services. For example, without a common ticket stock as the current system uses, a seller of airline tickets is necessarily limited in what it can offer to air travelers. Such restrictions can only limit the choice available to the consumer and ability of providers of airline tickets to serve the traveling public.

The problems that I have touched on and others you are going to be hearing about today, in my opinion, if we are going to address those problems, dictate the need for support for the passage of Mr. Anderson's legislation—and I would urge this committee to consider its position in terms of support for that legislation.

Mr. MINETA. Mr. Florio, thank you very much.

We are next pleased to hear from Chairman Luken from Ohio.

Mr. LUKEN. Thank you, Mr. Chairman.

I will attempt not to repeat too much the well-stated points that have been made by the other speakers. I certainly associate myself with those points.

As chairman of the Subcommittee on Antitrust and Restraint of Trade Activities Affecting Small Business, I have had the opportunity to review the matters you have under consideration in some detail. Our subcommittee has examined the marketing system for air transportation in the wake of the Civil Aeronautics Board's December 1982 decision.

Most of the operating travel agencies today are classified as small businesses. This industry does provide opportunity for both minorities and women to break into the business world and compete for business. Over 46 percent of the agencies—as the Senator stated, but I think it bears repeating—over 46 percent of the agencies are owned by women today.

As a subcommittee chairman with antitrust responsibilities, I take a very careful look at proposed changes in the application of the Nation's basic antitrust statutes. The potential for litigation is great, and the costs of such actions can be enormous and debilitating to the industry.

Sections 412 and 414 of the Federal Aviation Act grant the CAB the authority to approve air conference agreements and provide immunity from antitrust laws. Administrative Law Judge Yoder recommended continuation of this immunity. We were particularly interested in that question.

Some of the witnesses before our subcommittee called the travel agency system a monopoly. Yet, we found there is a great deal of growth, as has been pointed out. It is a very competitive situation, very procompetitive, and not monopolistic in its operation at all.

The statistics from the CAB show a 10-percent increase per year in the number of agencies during the decade of the seventies. There are now over 20,000 agency locations in the United States. Thus, the agency system does not show the classic barriers to entry.

I might point out, in my opinion, the antitrust laws are not absolutes. In framing legislation, in applying laws to situations, we find that the rules are very nebulous. And the basic standard is competition. The industry is competitive. When we apply that standard, when we apply that test to the situation today, we find competition does abound, does flourish. Therefore, there seems to be little reason to tinker with the situation where competition is working.

We found almost all observers, as the gentleman from New Jersey pointed out, including the CAB, agree that the agency system fosters competition. A new entrant would not have to make a large investment in a sales force—that is, a new entrant, a carrier into the airline business—if the people are already there through the agency system.

The significant policy choice today for Congress is no longer between the air traffic agreements as they existed prior to December and the decision of the CAB, but rather the choice is largely between Administrative Law Judge Yoder's findings, which are incorporated in Mr. Anderson's legislation, which I support, and the CAB position. No party of which I am aware would ask at this time for a return to exclusivity as it was known at that time.

In judging whether to remove antitrust immunity from the Air Traffic Conference programs, then, the question really becomes one of weighing the potential advantages of the programs envisioned by the CAB as a result of the Board's decision, against the risk that the loss of antitrust immunity could threaten the agency system.

I don't think we should tinker with the system. There is not enough indication of problems to justify taking the risk of destroying that system which has been working so well. That is why I support Mr. Anderson's legislation, and I urge the committee to recommend it.

Thank you.

Mr. Mineta. Mr. Luken, thank you very much for your statement and contribution to our subcommittee's deliberations. My hope is that you would have an opportunity to stay in case there are some questions on this issue.

Mr. Luken. I wouldn't miss it.

Mr. Mineta. We are pleased to have a former colleague of ours on the Committee on Public Works and Transportation, as well as a former member of the Subcommittee on Aviation, the Honorable Bill Boner. Bill has since gone on to bigger and greater things here within the Congress in terms of committee assignments. But he also has the privilege and honor of chairing the Congressional Travel and Tourism Caucus.

Mr. Boner was the author of this kind of legislation in the 97th Congress and has been a leader in this field.

We are pleased to have you back before our subcommittee. Mr. Boner, please go ahead and proceed in your own fashion.

Mr. **Boner**. Thank you, Mr. Chairman.

I certainly appreciate the warm welcome. I was before another subcommittee on Public Works not too long ago, although I have since departed this committee, I feel like I am still a member.

Mr. **Mineta**. You are a member of the Appropriations Committee, also.

Mr. **Boner**. I would be remiss if I did not point out you are also a member of that committee. I appreciate my relationship with you.

Chairman Mineta and members of the committee: On behalf of the members of the Congressional Travel and Tourism Caucus, it is a pleasure to be here today to discuss an issue that could shape the way we utilize the service of the tourism industry in the future. The decision of the Civil Aeronautics Board in its competitive marketing investigation and its impact on the tourism industry is of utmost concern to the Travel and Tourism Caucus.

As you have pointed out, Mr. Chairman, the travel and tourism industry is vital to the economy of the United States. In 1981 alone, travel receipts made up over 6.5 percent of the U.S. gross national product. During that same year, it provided some 4.6 million jobs directly and another 2.2 million supporting jobs.

The industry is comprised of nearly 1 million business establishments out of a total of 14 million in the United States, and of those 1 million businesses, 99 percent are classified as small businesses. It is the first, second, or third largest retail industry in at least 39 of the 50 States. It includes airlines, hotels, motels, attractions, rental car companies, bus and rail lines, cruise lines, convention and visitors bureaus, State government travel offices, food services establishments, and many other enterprises providing services to travelers.

When we look at the industry, it goes all the way from the mom and pop souvenir store to the major airline travel agencies of the country. It is important to recognize that all of these diverse enterprises have one reason for existence: To provide services to travelers in preparation for and during trips away from home. One of the key elements that links these diverse groups together is the travel agent. The travel agent provides the major suppliers of tourism services with a common retail outlet.

For the past 40 years, the travel agency system has served as an efficient and reliable network that provides quality service to consumers of transportation. The agency system, as we know it today, evolved over the course of years to meet the demands of the marketplace, while at the same time establishing credibility with the American traveler.

Prior to 1938 when the CAB permitted the airlines to establish joint agreements to implement a standard travel agency system, the public had no assurances that the tickets or services offered were valid, or that they would be provided as promised. The industry agency system created by these agreements has contributed to the ability of the industry to serve the public even during this confusing time of deregulation.

The system allows ticket exchangeability, interline passenger and baggage exchange. The present system also allows for standards of professional competency and financial responsibility that travel agencies must meet. There are no strict barriers that prohibit companies from entering the marketplace. As a matter of fact, approximately five travel agencies open their doors every day.

In considering the competitive marketing case, the administrative law judge made recommendations that injected new competition into the industry, while preserving the essential elements of the agency distribution system. The judge's decision is clearly based on the evidence that was presented to the commission. It was based on the history of the travel agency business and on the lengthy hearing record that examined all facets of the travel industry.

On the other hand, the CAB's decision to override the administrative law judge does not appear to have been made on the basis of evidence that something was wrong with the present system. It appears instead that the Board based its decision on the basis of academic theory, that a free market will more efficiently provide travel services to the public. The Chairman of the CAB, however, has not shown that his decision offers a greater potential for new ideas.

Why should we take a system that is working, that is recognized as a credible and viable means of coordinating travel arrangements for the American public and throw it into turmoil? Mr. Chairman, the Travel and Tourism Caucus isn't just concerned about the effects of this decision on the travel agency system, or the travel industry; we feel it is vitally important to consider the ramifications and possible outcome of this decision on the consumer of these services.

There are great risks involved in the CAB's decision, and we must ask ourselves what is the responsible thing to do? The public has come to expect and receive satisfaction with the present system. The CAB's decision risks the trust of the public by allowing inexperienced nonprofessionals into the industry.

There is a need for a balanced, reasonable approach to preserve the public benefits of the travel agent market system. I don't think that there is anyone here who doesn't recognize that if there were not certain regulations in this area, there could very easily be injustices, abuses, and even fraud perpetrated on the traveling public. I believe there is a responsible role for government.

I could easily point to a system we have seen across the United States. When health spas would be opened up, people would be asked by these memberships to join at a discount rate before they were ever built, only to find in their community that someone had walked off with the money they had put down for that membership. That could easily happen under the agency's ruling.

In contrast, Mr. Chairman, I do not believe the CAB acted responsibly in making their decision. Had the members of the CAB devoted the time necessary to fully understand the complexity of this problem, I might feel differently.

Mr. Chairman, I have raised in prior discussion with the Chairman of the CAB—and I would like to emphasize this point again today—I find it astounding that the members of the CAB would invest in the use of an administrative law judge, for the purpose of hearing the facts of the case and receiving testimony, and yet would reject almost everything that the administrative law judge recommended. I do not believe the members devoted the time or research necessary to come to a thorough understanding of the consequences of their actions. Nor have they, to date, presented testimony that supports the necessity of taking these dramatic risks.

If the CAB is to override all logic presented in some 40,000 pages of testimony, is it too much to ask: What are the specific benefits to be gained by the American public?

Mr. Chairman, I think we have something that works, a system that has not proven of disservice and certainly has not been challenged by a better or safer system. For those concerned about protecting the traveling public's consumer rights and promoting tourism as an industry employing 4.6 million Americans, the Air Travelers Security Act is a vital piece of legislation.

In closing, I want to thank you for the opportunity to express the concerns of the Travel and Tourism Caucus and to speak in support of what we feel is a reasonable approach to avoid a sudden and disruptive change in a system that has proven its effectiveness and has worked in the public's best interest.

Mr. MINETA. Thank you very much.

Mr. Anderson.

Mr. ANDERSON. Mr. Chairman, I have a statement in strong support of H.R. 2053 by Congressman Pepper. He has asked that his statement be entered into the record.

Mr. MINETA. The statement will be entered at this point, without objection.

Mr. ANDERSON. Thank you.

[The statement of Mr. Pepper follows:]

STATEMENT OF HON. CLAUDE PEPPER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. Chairman and members of the subcommittee, I am especially pleased to have this opportunity to submit to you today my testimony in favor of the Air Travelers Security Act, H.R. 2053, which I am co-sponsoring and strongly supporting. Thank you for your usual kind and thorough consideration of this matter of great importance to my constituents in Miami, Florida.

Over the years, I have watched our air passenger travel industry evolve into what is probably one of the finest systems of its kind in the world. I am deeply concerned about the impact of the CAB Competitive Marketing decision on this system, because the way I understand that decision, the agreements providing for the sale and distribution of tickets through accredited travel agencies will lose their antitrust immunity at the end of 1984. If this is indeed the case, I do not see how the airlines and travel agencies can sit together to develop a set of common rules and standards to serve the travel consumer. Since no single carrier can possibly serve all destinations, it is imperative that the law permit all carriers to cooperate with one another without fear of federal antitrust laws hindering efficient service to the consumer without diminishing the present level of healthy price competition.

I see no public benefit whatsoever in subjecting our air passenger system to federal antitrust laws since this would doubtless cause both consumer confusion and industry chaos. The result will be to complicate air travel, making it both more difficult and more costly for people to travel from place to place.

As you all know, I have particularly in mind the interests of our nation's senior citizens of whom I am one. An efficient air travel system is immeasurably important to this group, because the most meaningful experiences to many of its members are the trips which bring them together with children, grandchildren, and great-grandchildren who, because of our highly mobile society, often live great distances apart. I am against anything which will make this travel more difficult and expensive. Air travel is already complicated enough since airline deregulation, and it is because of our accredited travel agencies that many senior citizens are able to travel at all since agencies are the only reliable source of price and schedule information for all carriers. If, as is likely, CAB removal of antitrust immunity from the agency-carrier agreements subjects the industry to complex antitrust litigation and air travel, becomes more confusing as a result, then Congress has a responsibility to prevent this before it happens rather than afterwards. We simply cannot afford to trade something that works so well for something unknown.

I also believe Congress must assess the impact of the CAB decision on U.S. international air travel. As you all know, I come from an area of the country which is an important center for foreign visitors, almost all of whom arrive by air. Our current agency-carrier agreements enable them to arrive and depart with few problems and also enable people in the United States to make travel arrangements through any of the 22,000 accredited travel agencies here to go anywhere in the world. I understand that numerous foreign governments have objected to the CAB decision, and that if foreign airlines are subjected to antitrust litigation for continuation of the collective agency appointments system, there will probably be retaliation against our own carriers to the detriment of everyone who flies in U.S. international air travel. I see no purpose in this, and yet I can easily see it happening under the proposed changes to immunity.

I ask the Subcommittee to consider whether the system we have now functions well. I would suspect that the courts and antitrust bar will redesign the system with no assurance of improvement and great risk of a decline toward chaos following lengthy litigation which cannot possibly result in anything better than what we have now, an effective, efficient air travel system with open price competition.

I respectfully urge you to study the merits of this legislation, and thank you for your time in giving it all due and proper consideration.

Mr. MINETA. The legislation you are supporting would continue antitrust immunity. Many elements of that agreement would not be affected by withdrawal of antitrust immunity, but one of the main features of the agreement that would be affected are the "how you do business" provisions of the agreement. These provisions require, for example, that wherever an airline ticket is written, there has to be a fully staffed office open to the public at least 35 hours a week, and so on.

This agreement prevents airlines from using agents who would prefer to operate in different ways, and it prevents agents who might have better ideas on how to serve the public from doing so. Any other industry which attempted to collectively restrict how services were provided to the public in this way would be subject to antitrust challenges.

The task we face is to try to decide what overriding consideration should lead us to compel antitrust immunity to be given to this agreement. Let me just cite some examples of the kinds of "how you do business" restrictions in this ATC agreement that you want immunized, and see what overriding considerations you feel exist that require preservation of these restrictions by antitrust immunity.

Suppose I, as a travel agent, want to set up a temporary ticket writing desk in the lobby of a major convention that will be in town for 2 days, and the convention organizer wants me to do that because it would help meet the members' needs. That would certainly be good for my business. But the existing ATC agreement prevents me from doing that because it wouldn't meet the 35-hour rule.

Now, why should we preserve that restriction with antitrust immunity?

Mr. LUKEN. Well, it seems to me that we base this immunity on the fact that a system has been established here in order to provide professional and reliable service. And the particular rules have been set up as they are in almost any industry. Sometimes they are self-regulating; sometimes they are dictated by Government regulation. But, in any event, some of those details could be reviewed, perhaps, as we go along.

But this is a complex business which has been established over a period and has been fine tuned over a period of time, which works out to be very, very competitive. And I think the examples that the chairman cites, even if they were to be continued, would be a small price to pay for the more important overall system that has been established which does provide good service.

The purport of the chairman's question would be, is service being provided in a broad sense, in a complete sense? I don't think there would be an industry that could claim that it provides more facility, more access than this industry with the 20,000 or so agencies that exist.

Mr. ANDERSON. Will the gentleman yield?

It is true, you might go to a convention where they had set up a table or a booth to sell travel services, among other things, and, as Mr. Boner mentioned, you might leave your money there. But the money might not get where you thought it was going to go, because there is a difference between someone who has set up a table or a booth at a convention, or at some drugstore and an accredited travel agent.

Right now our travel agents are fully accredited. Although travel agents are carefully checked into it is not difficult to become a travel agent. But you do have to be a responsible person. When you go to a travel agency and buy your ticket, you must be sure that they will be there in the future. You also must be sure that the travel agent is versed on the subject of interlining of baggage, ticketing and everything else in this complicated business.

Mr. BONER. Mr. Chairman, if I may comment on that, as well. If the travel agent cited in your example is a certified, qualified travel agent, has an establishment, and is not a situation where they are working out of a camper or out of the backdoor of the house, and if this travel agent meets all of the requirements, if he or she has an office—which is nothing more than an extension of an office where all of the services would be available to the consuming public—and the travel agent chooses to set a booth at the convention and it is properly maintained, then I think you have cited an example of where some of the agreements or some provisions in those agreements need to be modified.

But I think the 35 hours and the establishing of an office accessible was probably a way—and I don't want to attempt to inject myself into the thinking of the minds of those at the time when this agreement was made—but I would assume that they were trying to say: What can we place in the way of standards to ensure that this is not a fly-by-night operation? I don't think you or anybody here or the CAB wants to see if a convention center sets up, and I go in—and I am not a travel agent but I want to set myself up as that, I want to rent a booth, and they have an obligation to rent me a booth—I can easily deceive the public. I don't think any of us want to see that. I would assume they sat there and said, "What can we do to insure the public is dealing with a reputable company?"

I think, Mr. Chairman, all other things being equal, you have cited a situation that certainly could be allowed to take place if this were an extension of a main office, if it were a representative who was operating with the full support of the computerization, the knowledge and professional experience that they would have at their home office.

So I think all things being equal and the consumer public being aware they are protected, I think you have cited an illustration of where there should be some consideration for change. I think those who have entered into the agreements now recognize that perhaps the time has come that some alterations in those agreements should be made. But certainly not to the extent that they open the door and allow anybody to go in and set up, a nontravel agent, as well, and to take advantage of the consuming public.

Mr. **Luken**. Mr. Chairman.

Mr. **Mineta**. Just as a response let me say that the problem I think exists in the minds of some people who have some concerns about this is that it does immunize all aspects of these agreements.

Mr. **Luken**. Mr. Chairman.

Mr. **Mineta**. Mr. Luken.

Mr. **Luken**. It is my understanding that before the CAB decision, of course, the law provided the authority to approve Air Conference agreements and to provide immunity from antitrust laws. The CAB would still have the authority, and if it sunsetted, it would be our thought to turn that province over to the Department of Transportation or some other agency, so they still have that discretion under legislation whether to approve the Air Conference agreements. So if any of these provisions which the chairman suggests would be burdensome, they would still have the authority to at least suggest, with the authority, to withdraw such immunity.

Mr. **Mineta**. Isn't that the problem? The Administrative Law Judge decided one way; the CAB said something differently, and what the legislation says is, go with the ALJ's decision.

Mr. **Luken**. With the ALJ's decision on approving the Air Conference agreement. But the CAB is just taking the immunity away, period.

Mr. **Mineta**. Including immunization, whether it be for the 35-hour rule or any of the other standards that are involved.

Mr. **Luken**. If we could go back to the situation before the CAB decision, then it would be ideal not to require the legislation. We would agree with that but the CAB's decision requires the intervention of legislation in order to overturn it. It would be better if it were self-regulating or if the CAB's decision had been a wise one as the agency with the regulatory power.

Mr. **Mineta**. Mr. Anderson, did you have a comment?

Mr. **Anderson**. No.

Mr. **Mineta**. I just had some other examples of the "how you do business" restrictions. For instance, if I am a travel agent and I have a large client who buys lots of travel through me, and I do a great job for this person. They are happy with my service except for the delays in getting tickets that I write across town to that client's office. Let us say he comes to me and says I would like to have you install one of your printers in my office so that I can have the ticket the instant the travel agent writes it.

I, as a travel agent, would like to do that because he is a good customer and it is good business for me, and we could cut down my cost of having someone run the tickets across town. But again the existing ATC agreement prevents me from doing that because his office would technically become a ticket writing office—a ticket writing location.

His office then would not meet the ATC agreements. What about if I am a travel agent in a resort spot? I might be able to serve the public by adding a location there on the weekends. Or I might decide to meet the needs of the public by having locations open only during the evenings or operating a phone-in agency only. I want to adopt any of these business approaches, and I meet all the honesty, competency and financial responsibility standards. The public is happy with the service that I provide.

Under the existing ATC agreement I would be restricted from offering any of these services. So is that really what this is about?

Mr. **Boner**. Mr. Chairman, I think that what you are citing is an excellent example that if immunity is continued to be granted there should be some type of oversight as to certain provisions. In the first instance, most of the travel agencies I deal with today, deliver the tickets to me. So in some ways that problem could be solved. But you have highlighted a more important situation.

I think it is a valid observation on your part, and that there are some provisions in these agreements that perhaps should be altered. I would like to expand on that. I would like to say that we sit in Congress and we pass laws to tax individuals. Yet we know there are many multimillionaires who never pay a dime in taxes. That doesn't mean we are going to do away with our tax system. What that is saying is that there are provisions of every law where it might not be exactly like it should be and there is a loophole for people to get into.

Certainly as it relates to what you have brought to attention here, there are some provisions that should be addressed. Perhaps there should be some oversight to these agreements that are drawn up. But at the same time, Mr. Chairman, I think that you are talking about the philosophy of immunity here. Just because we pass laws that provide higher depreciation for property. We fully well know that when we set up these shelters if we may call them that, there will be many wealthy individuals who will take advantage of these shelters and never pay a penny of income tax.

Now, we do not do away with the shelter provisions because we realize that even though there are some disadvantages to those provisions there are greater advantages that outweigh them. And we feel that as we look at the immunity of these agreements, we can recognize the provisions of those agreements aren't perfect and they should be looked at and they should be evaluated and reevaluated.

But we also feel that the offsetting advantages of that are the insurance to the traveling public that they are not dealing with some fly-by-night agency. And Mr. Chairman, I have become more and more enlightened in my 38 years of living that I think, well, it is impossible for the public to have some fraud take place or it is impossible for some stranger to walk into a woman's house, or a man's, an elderly man's home and defraud them out of thousands and thousands of dollars, through insurance policies and through selling of services. And yet every day across this country, even several years ago in Nashville, Tenn., in the hometown that I live, we saw it happen.

And so I think that whenever we look at these provisions we have to recognize that there are going to be some disadvantages. But we like to think that the advantages far outweigh those disadvantages.

Mr. **Anderson**. Mr. Chairman, I would like to echo the remarks of Mr. Boner. We are not locked into not making changes in the program. I agree with Mr. Boner's idea of continued oversight of the system. But we have to remember why these consumer protective provisions were adopted. Forty years ago we didn't have them. I have heard horror stories about how airline travel used to sold and marketed in this country. And these standards were put in to correct these abuses which occurred rather frequently.

Now, the CAB wants to disband this system. We feel that, in the public interest we must protect this system. It has worked very well. Now, if there are some provisions that seem a little unreasonable, surely these things can be corrected without throwing the whole ATC system out the window.

Mr. **Mineta**. That is the point. H.R. 2053 reverses the CAB decision and says the ALJ's decision is in place. But in terms of these aberrations, how do we deal with it? How is the CAB going to reverse that as a decisionmaking body? Can CAB reverse immediately what the legislation is reversing, their own decision?

Mr. **Anderson**. I would think any reasonable provision you suggested could be written into H.R. 2053.

Mr. **Mineta**. Does that relate also to exclusivity? Should exclusivity be exempted——

Mr. **Anderson**. I think this word "exclusivity" is used a bit too loosely. There are over 22,000 accredited travel agents out there today. Almost anyone can become an accredited travel agent. But they do have to meet certain requirements. If you throw this out, you are going to allow unaccredited people to issue tickets that don't know how the system operates. This is clearly not in the public interest.

Mr. **Boner**. Mr. Chairman, I would like to make one comment. I think that the legislation and the vehicle that we have attempted to try to present before the Congress is not locked in concrete. We feel that in the wisdom of this committee and as this bill hopefully progresses through the legislative process in Congress, that there will be a possibility for alterations and amendments.

We certainly want to look at those and examine each one of them. We feel that the reason we are here today is that because we had one decision by the administrative law judge, then we had the CAB making a totally reverse decision in many ways. And Mr. Chairman, we feel that the consuming public and those parties involved in this situation have no other recourse but to come to Congress and feel that in the wisdom of Congress, that we will use all of the amendment vehicles that we have at our disposal to try and I think the purpose of this whole bill is not to say we are going to go back in and lock ourselves into just what the law—if in the wisdom of this body we feel that there are some changes that ought to be made, that the administrative law judge didn't make, I don't think we should be in a position of "hands off" on those.

But as we formulate what we consider to be the policy for the traveling system of this Nation, this is the body that ought to be the ones to inject the changes. And that if we feel changes are necessary, we ought to have them injected here just as well as at the CAB.

Mr. **Mineta**. If I might use this as an example, as Mr. Miller, the chairman of the Federal Trade Commission did. Let me take from his own testimony. Perhaps an extreme example will illustrate. If Congress were to enact a law that prohibited the manufacture of all but Navy blue clothing, unit costs would be low and there would be substantial competition in both manufacture and retailing of apparel.

However, one would not conclude that the industry was performing well in the sense of satisfying consumer preferences. Nor would one conclude that the industry was without substantial competitive restraints. So while the travel industry may both have continued growth in the number of travel agency locations, I would ask whether the services being provided and the forms of marketing being used are those most desired by customers.

I think that sort of sums up this whole issue of exclusivity in the sense of, do we really want to go in that direction?

Mr. **Anderson**. Are you suggesting that the travel agency industry is not doing a good job? It seems to me it is probably one of the best examples of free enterprise we have today.

Mr. **Mineta**. That is not the point of this. It is the question of standardization———

Mr. **Anderson**. They are not all standard. There are travel agencies which offer considerably different types of service.

Mr. **Mineta**. But the product that they are offering is essentially the Navy blue suit.

Mr. **Luken**. Mr. Chairman, it doesn't occur to me that there is any comparison there at all. What Mr. Miller was suggesting was an example of a capricious, restrictive kind of an order.

Mr. **Mineta**. Admittedly this is an extreme example.

Mr. **Luken**. But here we are talking about an industry which is approved by all segments and apparently the consumers. There has been no hue and cry from any consumer group that we have heard. From all sectors we have an approval of an open system which is flourishing, which is providing broad excellent service. The chairman mentioned a few cases where it might not be quite complete, and our response to that is, under continuing jurisdiction, vacating this order and establishing Judge Yoder's order would not prevent continuing oversight of those particular instances which I submit are not necessarily basic to the operation of the system or basic to good service to the consumers or basic to the broad operation of the whole system.

I just state respectfully that Mr. Miller's example does not pertain in any way to the system we are talking about here.

Mr. **Mineta**. Thank you.

Mr. Hammerschmidt.

Mr. Hammerschmidt. Thank you, Mr. Chairman. And thank you, our distinguished colleagues, for remaining here. We know you have your own committees to attend to.

Tom, you held hearings in your subcommittee about 2 months ago I believe it was. We might take advantage of whether you have had time to digest some of the things you heard there. I understand that the CAB chairman testified before your subcommittee that their decision benefits travel agents that are willing to compete in ways that the previous system prohibited. I wonder if your subcommittee has explored what those benefits might be.

Mr. Luken. Well, it was our impression that Mr. McKinnon was not able to amplify on that. That he was following the principles of opportunity without giving—I do not recall specifics, any plethora, any abundance of statistics, of instances to back up that statement.

Mr. Hammerschmidt. Have you had a chance to study the CAB testimony of today, that is coming to this subcommittee today, to compare the two?

Mr. Luken. No, I have not.

Mr. Hammerschmidt. Let me pursue that a little further. In the hearings they had before your subcommittee, the CAB chairman testified that the airlines would also benefit from their decision. Did you have the opportunity to explore that any further?

Mr. Luken. Well, the airlines testified in favor—opposed the CAB order and in favor of Judge Yoder's decision. The airlines I think would clearly benefit from many aspects of the existing system. One of them obviously, which is very salutary, that new airlines entering the field do not have the deterrent, do not have the impediment of having to set up a sales force. They can come in with their sales operation in place. Therefore, this is very procompetitive from our standpoint, and I think is a very, very important aspect of it.

The airlines are in favor of—I don't know that they actually—I think they are. They are in favor of the legislation which we are advocating.

Mr. Anderson. The ATA and IATA have both strongly endorsed our bill.

Mr. Luken. They testified to that effect. I am sure they will be testifying here.

Mr. Hammerschmidt. Let me pursue your hearings just a little bit more because I know the thrust of them was the antitrust provision, what effect it would have on small business. I would be interested in comments relative to concerns about the potential damage the CAB decision would have on small business travel agents.

Mr. Luken. I think the damage would be in possibly bringing the industry, if not to a halt, binding it up in a great deal of litigation. When we are talking about a system that is working, and I don't like to use too many superlatives in describing anything, but in this particular case we can say from all sectors came almost superlatives, at least approving statements from all sectors within the industry and without those who have experience with it, that this system is working.

Therefore, whatever the adage we want to use, whatever the buzz word you want to use, if it ain't broke don't fix it or don't tinker with it, and so on, I think these are certainly valid. They are valid to me in my approach to legislation. So we can't anticipate all of the problems, but we can say that litigation would be fostered. Litigation might be—might abound.

Litigation might bring the whole system into jeopardy. This would be damaging to the industry and, therefore, that is what we are concerned about. We are concerned about these 20,000 or so—not the only thing, but from a small business standpoint, we are interested in virtually the 100 percent of these 20,000 different businesses that are out there.

But also as it affects the industry and the consumer. I don't know whether anybody has learned of any particular hue and cry or even any call by any consumer groups for changes. Where did the suggestion for changes come from? It came from the abstract principles of deregulation. I don't think that is a good basis for the CAB's decision. I don't think it is a good basis for legislation.

Mr. HAMMERSCHMIDT. What about your subcommittees looking into the effects on larger travel agencies such as American Express? Did you pursue that inquiry?

Mr. LUKEN. I don't recall that we had testimony on that.

Mr. HAMMERSCHMIDT. Let me jump back just for one more question. You mentioned the airline testimony. I wonder in your view, is airline support for H.R. 2053 based in part on the carriers' fear of economic retaliation from the agents?

Mr. LUKEN. Well, I cannot impute motivation for their testimony. I have nothing on which to base such a presumption. Their testimony was clear and forthright, seemingly forthright. In their testimony, their conclusions seemed to be based upon their desire to continue a system which was working well from their standpoint, which was providing them with a competent professional sales force, and which was an aid to the continued good operation of their businesses.

So I would have no reason to discredit their testimony. Not only was there no indication of such a problem, but it would be contraindicated.

Mr. ANDERSON. If the airlines didn't have immunity, just think what would happen. There is a tremendous amount of talking back and forth on schedules and interlining and many other things. If we remove the immunity they now have, the whole system could be washed down the drain.

Mr. LUKEN. They would be involved in the lawsuits, too.

Mr. HAMMERSCHMIDT. Mr. Boner, do you have a comment?

Mr. BONER. I have a comment. That is you know we live in a world of politics up here. I heard this rumor, and I think obviously it is a rumor by those who are not in favor of our legislation. But I think the practicality of the situation is, I don't think travel agents are going to push the airlines around politically up here and force the airlines to take a position that they don't think they can live with. And so no matter what rumors you hear, I don't think that the airline industry, as long as it is in existence and with the clout, politically speaking, that we will have in their ability to have their desires expressed, I think that those who would say the airlines have been coerced or blackmailed into supporting this legislation are merely throwing up a smokescreen, because when I served on this committee and on Public Works I didn't notice that the airlines and their associations were pushed around. I think that they stood on their own feet. If they didn't agree with any other segment of the industry, they said so. Where they did, they did.

I think if they come to the table and testify in support of the legislation, they are doing so with the full knowledge and awareness that it is beneficial to the airline industry first and foremost from their perspective, and also to the consuming public.

Mr. **Hammerschmidt**. I do recall that one major domestic carrier was going to ask the travel agents to share with them some of the escalating costs of tickets, and they backed off of that position. I just remember that from the past. But let me ask one more question. Let me direct it to you, Bill, as a member of the tourism caucus.

Would you comment on Justice's conclusion that benefits of the system can be preserved without antitrust immunity?

Mr. **Boner**. I think that when you start discussing rates, when you start having to have the free flow of information that I think you have to have, because with airline deregulation we have more airlines, we have small computers, commuter services. And there is a need for a free flow of information.

If we attempt to try to enforce what we now know as our antitrust laws in this area, I think it would be detrimental to the flexibility and efficiency of the travel agents to get the information and provide the services necessary to the consuming public.

Mr. **Hammerschmidt**. Well, in discussing rates which you mention, you don't mean to imply there is immunity for that, do you?

Mr. **Boner**. No.

Mr. **Hammerschmidt**. Thank you, Mr. Chairman. Thank you, gentlemen.

Mr. **Mineta**. Mr. de Lugo.

Mr. **de Lugo**. Thank you, Mr. Chairman. I have no questions of any of the witnesses. I have been impressed by their statements. My position coincides with theirs. I am a cosponsor of Chairman Anderson's bill. I would just like to commend Tom Luken, Bill Boner, and Chairman Anderson on their fine statements this morning.

Mr. **Mineta**. Mr. Packard.

Mr. **Packard**. Thank you, Mr. Chairman. I am sorry that I was unable to attend the hearing while the testimony was being given. We had a markup in another committee. But I have read much of the testimony. I would like to just ask a question or two.

If the decision of the CAB were reversed, what effect would this have on the development and proliferation of direct ticket sales through business computers and home computers, through the ticket machines placed in remote areas and through the sales outlets that would be open on weekends, evenings, and so forth that normally would be closed to the regular travel agency businesses?

Mr. Luken?

Mr. **Luken**. If I understand the gentleman's question, I don't think it would have any effect. They would still operate through the telephones as they do today. Are you referring to the Ticketron operation?

Mr. Packard. I am talking about a whole new segment of business operations for selling tickets that I perceive as down the road, and perhaps coming now, where there will be a closing off of that area of competition to the ordinary daily travel agency business. It would be an extended service to the traveling public.

Mr. Luken. Well, I don't think there is anything in Judge Yoder's decision which would inhibit the development of these—in fact, it specifically allows for entry into the retail ticketing business by firms interested in nonagent or traditional retail relationship. It particularly allows for that, and any similar kinds of entry into nontraditional aspects of the business by new firms.

I don't think that such innovation is anything but encouraged by Judge Yoder's decision which would be adopted by this legislation.

Mr. Packard. Let me ask you a specific question on that particular issue. If a business had a travel department within its own organization, would that travel department be able to make travel arrangements for their executives and their employees to conferences, conventions, and other business appointments, under this decision?

Mr. Luken. Would they be able to do what? They would be able to make——

Mr. Packard. Make their own travel arrangements?

Mr. Luken. Absolutely, and they would be able to make an agreement with the airlines which would be a commission to them.

Mr. Anderson. Under law, BTD's can negotiate lower prices right now, they just don't receive commissions like travel agents do.

Mr. Luken. Well, it would have the same effect as a commission, but they can't hold themselves out as being accredited without accreditation. They can still get the commission. They can negotiate it with the airlines.

Mr. Anderson. BTD's are purchasers of tickets who do not provide their services to the traveling public. Or more precisely they are the paying customer for the airlines. Thus, they are really not a travel agency.

Mr. Packard. That is precisely the point. They are the users of the system, and as of now, I understand that they do not have the option to do their own ticketing and negotiate their own fee.

Mr. Luken. If the gentleman would yield, they do have the right then and now and in the future under any of these options to negotiate an agreement with the airlines whereby they would receive what would in effect be a commission. They can't hold themselves out as agents selling the public, which they are not. Of course one of the results of that would be as far as the airlines are concerned that if they were required to allow BTD's to become travel agencies, then they would be giving commissions to them, and they are the people who have the most costly operation as I understand it for the airlines, because the kinds of tickets they sell within the company are the ones where changes are made at the last minute and cancellations are made, and so on.

This is a very expensive thing for the airlines. And this would be one of the reasons that the airlines wouldn't be particularly in favor of it. But in any event, they can negotiate a commission arrangement with the airlines for the tickets which they sell within their company or consume, whichever you want to call it.

Mr. **Packard**. I suppose my greatest concern is that we have well organized representation from the agencies, from the airlines, and from almost every other portion of this whole problem, except from the traveling public, from the consumer.

To me, the system seems somewhat anticompetitive. The very process of giving antitrust immunity would not be necessary if there was open competition. The one group that is suffering from this process is, as I view it, the very people that I would think we should be looking to protect. And that is the consumer, the traveling public. They have no representation. They have no input. They become subject to a fixed percentage of the fare. They have no opportunity to negotiate, and no opportunity to deal with agencies that might consider a lesser percentage, which would reduce the cost of traveling.

Would you respond to that?

Mr. **Boner**. I would like to. First of all, I think the idea that there is not competition in the marketplace is erroneous. I have met and talked with agents at several conventions.

They are creating innovative changes. They are buying parking lots to encourage customers, where they will let you come and park your car off the airport and they will ship you to the airport.

I think we see a lot of innovative changes taking place. I think the competition out there is tremendous for the consuming public.

Mr. **Packard**. Let us talk about the competition for price. I am not talking about competition for business. I am talking about price competition.

Mr. **Boner**. I was responding to your question that Representative Luken had spoken to. I think that as it relates to the price, I think that price setting is going to be with the airlines themselves and not with the agents. The agents get a commission, yes. They have that. But certainly they are not the ones to set the price. The airlines are going to set the price.

We have generally found that the consuming public, for example, American Airlines runs a direct flight from Nashville to Washington, just about 2 weeks ago they jacked the price up by $100. Suddenly on that particular line their passenger load dropped and the passengers started flying Piedmont and a couple of others. As far as the price, if you are talking about the commission itself, the standard 6-percent commission, I think it is another issue that could be directed.

But I think that when talking about the price of airline tickets you have got to look to the airlines for that and certainly not to the travel agents.

Mr. **Packard**. Does an airline have the option to lower the commission with agencies?

Mr. **Anderson**. Yes.

Mr. **Luken**. It is my understanding that that was changed a couple of years ago. That there is that right before the CAB decision and after the CAB decision which doesn't affect the right to negotiate that contract. Now, the fact is that the commission rates are negotiable that is my understanding. I don't know whether anybody knows anything different. My staff just verified for me. I don't think this decision nor this legislation affects the right to negotiate.

It may be that there is an industry practice to maintain it at a certain level, 10 percent or whatever it is. But I don't think this legislation or this decision affects that. Now, if the gentleman has any information that it does——

Mr. PACKARD. I think it does in this sense. We as a governmental agency are being asked to continue antitrust immunity. Antitrust immunity provides the vehicle through which the agencies can hold the line on specific negotiated and fixed commissions with the airlines. I recall reading a couple of years ago of an airline that attempted to renegotiate something different than what was the standard fixed commission; the airline was blackballed and forced into a position of returning back to the very narrow and standardized procedure.

That is what I am talking about in terms of limiting the competition. Competition is limited by the structure and by the Government issuing antitrust immunity. If there was no immunity, then it would be open, in my judgment, to allow through competition and negotiations with the airlines from a very open position rather than from a very locked in position.

Mr. LUKEN. Well, the legislation provides as a policy that in the public interest, carrier cooperative, working arrangements for marketing of transportation be subject to continuing administrative oversight with respect to compliance with the antitrust laws.

Now the gentleman is bringing up something he heard of at some previous time. As I said, it is my understanding that we are not locking in any kind of a mandatory percentage of commission. That that is not in the current agreements which Judge Yoder had approved. It is not there. It is not affected by Judge Yoder's decision or by the legislation.

Mr. PACKARD. Let me ask a hypothetical question of the honorable gentleman, then. What do you think would happen to travel business executives at 3 percent commission? What do you think would happen to United Airlines?

Mr. LUKEN. Did you understand?

Mr. BONER. They can do that right now.

Mr. PACKARD. They perhaps can legally do that but under the system what would happen?

Mr. BONER. If they want to, they can.

Mr. PACKARD. I think, in fact, we would see perhaps some concentrated efforts against United Airline by agencies that would say, cut it out or else we will remove you from our list. I think the airlines under this system have and can very easily become subjected to a system they really cannot buck, no matter how big the airline is.

Mr. ANDERSON. As Mr. Boner said, BTD's can do this today. They have the right to negotiate any commission they choose.

Mr. BONER. There is nothing for the travel agent to gain either way. If IBM can cut a deal with United, they still have the right to deal. The travel agents, by blackballing United, aren't going to get any of IBM's business anyhow. Whether they negotiate a 3 percent or 5 percent or 10 percent, if I may use the only saying there is no sweat off the agency's back because they are not going to get the business either way. Whatever agreement IBM works out with the airlines is going to be devoid to an agent because if I am an agent sitting out there and you are going directly to them, I am not going to get the business anyhow.

Let us say we hypothetically throw open the doors to everybody. No rates, no agreement on what your commissions are. You know what will happen? The big buyers will get the discount. Who will get the higher cost? The individual small buying consumer. The big buyers may get a discount, a rate of 3 percent. When the individual goes to purchase that one ticket, they may be paying 8 or 10 percent. We all know that. So I think that some kind of agreement on the commission, at least lets the consuming public which you and I have expressed a concerned about, at least let them know that the business, and I have met with the traffic, the business corporations that have their own agent. They have that right now. They can establish that, and they are not in competition right now with the agencies as it relates to strictly their business.

There are some in the business, they want to say we want to sell to the public, too. That is where you get into a question of should an in-house business agency be able to sell to the public as well. What you have pointed out here is the travel agents aren't going to get a break one way or the other, and it is strictly a competitive negotiation.

Mr. LUKEN. If the gentleman would yield, in the CAB decision is a historic reference to the fact that in 1978 the CAB issued a decision disapproving agreements fixing commission rates. So this verifies my recollection that that question has been moot. It has been handled by the CAB back in 1978 and it is not our position, it is not my position, at least as far as this legislation is concerned, that it would have any effect upon fixing commission rates. That is passe. That cannot be done. It was strictly a matter of negotiation before 1982. It is a matter of negotiation now.

If this legislation passes, it will still be a matter of negotiation. I don't know of any subtle pressures, the gentleman suggests blackballing, I don't know really of the existence of any subtle pressures that would depend upon this legislation which would influence the fixing of rates contrary to this decision.

Mr. ANDERSON. We also have a stake in making sure that the travel agents earn enough in commissions so they can stay in business, and continue to offer their professional advice to the public. Many are located in small towns throughout America, this is middle America. If they sell $1,000 or $2,000 worth of tickets per day and only receive 3 percent commission, they will only make $30 to $60 to run their business. They wouldn't be able to stay in business.

Right now commissions for travel agents are pushing 10 percent. This is a livable commission, whereas the BDT's could negotiate a 3-percent commission and survive.

Mr. LUKEN. 9.6 percent in 1981.

Mr. PACKARD. Mr. Chairman, I know my time has expired, but I am very concerned about this issue. I have met also with some of the business people. They don't want to sell to the public. They simply what to provide transportation to their own business executives although they may have the right, they do not perceive themselves having the ability to negotiate their own travel commissions without repercussions either to the airlines or themselves.

Mr. LUKEN. But their problem is with the airlines. They can't negotiate it with the airlines because the airlines provide them with what amounts to a very expensive service. Their particular clients are the ones who cancel at the last minute and the airlines run around with empty seats.

Mr. PACKARD. I am not sure that is the reason they can't negotiate it with the airlines. The reason they can't negotiate with the airlines is because the airlines are not willing to put themselves out in front on a separate negotiated issue apart from the agencies. I am very concerned about the agencies. I certainly am not antiagency at all. But I just don't believe that any group of businesses in America ought to receive special protective noncompetitive policy. That is my concern.

I can give you examples of where airlines have been backed away from negotiating on a private basis simply because of pressures from the agencies. I don't need to get into that. We have them available. This is the concern I have with the structure.

I recognize it is a very complex issue and I don't have good answers. But I am concerned about the noncompetitive atmosphere that is created in this whole structure.

Mr. ANDERSON. Wouldn't you agree that a system which pits over 22,000 travel agents against another including over 1,000 new entrants each a year, is a competitive industry?

Mr. PACKARD. Well, my colleague from California sees competition a little different than I do. I am a dentist by profession. If all dentists were required to charge the same fee, you may go out and compete on a different basis, on providing service, on the quality of your work, on the spaciousness of your office and all, and the number of personnel that you look after them with, and so forth. But if you are required to charge the same fee, then that is limiting to good competition in any field, whether it be mine or whether it be the traveling business, or whatever.

I am concerned that we are standardizing the very heart of the competitive system, to the detriment of the traveling public. The airlines negotiate from their point of view, but they cannot negotiate from the point of view of the commissions.

Again I have to state I don't have good answers. I think my time is up.

Mr. MINETA. The time of the gentleman has expired. I believe Mr. Edgar, if you would go ahead and continue, but I think Mr. Boner may want to——

Mr. EDGAR. I yield to the gentleman 30 seconds.

Mr. BONER. Just one comment. Whatever commissions that the agencies get is an agreement entered into by the airlines and the agencies. Am I correct? So therefore, they have to acquiesce in that agreement.

Mr. EDGAR. Are you referring to the air traffic conference agreement?

Mr. BONER. Yes. The other point is there are so many lawsuits going around here, Braniff is suing everybody because they think American did them in. If you want to look at the injustices, you go look at the computer system. There is a greater injustice as to who pops up how, you will find a lot more bones buried over there.

Mr. PACKARD. Could I close by answering that statement?

Mr. EDGAR. I have the time. I yield to the gentleman for 10 seconds.

Mr. PACKARD. Thank you. Ten seconds. It is simply that they do not have anyone else to go to negotiate. There is nobody else to negotiate with. They are required to negotiate with the agencies. That is unfair.

Mr. EDGAR. Well, the questioning has been fun. I have never sat through a hearing where we have questioned our own members as much as we have this morning. I hesitate to even ask some questions. But let me just ask them as quickly as I can.

I am involved with a group called the Clearinghouse On The Future that is trying to get some foresight into the prospect of legislative agendas. And I would ask just the future's question first. What do you see in terms of the travel industry 5 years, 10 years, 20 years down line? Are you advocating that we keep the system in place and make little or no innovative changes over the next 20 years? Or do you see vast changes, and how do you see those changes taking place?

Mr. BONER. I would say to you, first of all, that you have to have a system that will allow for change to take place as is needed. I think the legislation we structure ought to do that. But I think that at the same time as a government, we have set standards for the airlines. When we take off on an airplane, we assume that that airplane has met certain Federal standards. And when we go to stop on that plane, we can assume that.

In the traveling public, I think that there needs to be some set of standards maintained. They ought to be able to be changed from time to time.

Mr. EDGAR. In terms of safety I would agree. But let us talk about innovation. I recognize innovation is possible within the industry, but isn't innovation such as the things the chairman was talking about, and one suggestion you made about a parking lot, isn't that kind of innovation in this particular industry only possible if the industry as a whole; that is, the airline industry, decides that this would be a good way to proceed?

Innovation outside the rules and regulations of the conference agreement as I understand it are not really possible. Would you describe innovation as being easy under those circumstances?

Mr. BONER. I am not sure what you have reference to. I don't know that these agreements have caused, for example, I know of some travel agencies that, like I said, they have gone and set up a parking system.

Mr. EDGAR. Wasn't that only permissible by total agreement of the industry?

Mr. BONER. I cannot answer that. I don't think so because there are some who do it and some who don't.

Mr. EDGAR. The air traffic conference agreement, as I understand it, the term exclusivity referred to in that agreement says that, let me just quote this, "airlines party to the agreement must use the industrywide agents exclusively, no one else." And the CAB decision was that airlines could, if they choose, use those agents, but could also use others. But under the exclusivity arrangements of the air traffic conference agreement, as I understand it, they are really locked into using the agents and the agents are locked into policy decisions.

Mr. Boner. No question about that. But what we are saying is, the requirements for being an agent are not noncompetitive. Mr. Packard was a dentist. Not everybody can go in—every State places certain requirements on a person to become a dentist. There are many States where people feel because of their examination boards that that is a restraint of practice because they try to flunk people out. But the requirements to be a travel agent are minimal. If we were saying that to be a travel agent you had to be a millionaire or that you had to have 50 years of experience, we are not saying that. But competition is there.

Mr. Edgar. Let me go back to my word "innovation." Suppose we wanted a fancy new computer system that worked all by itself without people and could be located in hotel lobbies. That kind of innovation which I am not necessarily advocating.

Mr. Boner. I think rules ought to be flexible enough to look at possibility of changes. Of course we can't predict 20 years ahead but I can't say a specific guess.

Mr. Luken. Would the gentleman yield?

In response I would read an excerpt from Judge Yoder's decision. "We conclude that the ATC agreement should be amended to eliminate provisions for 'marketing exclusivity' which prohibit preventing payment of sales commisstions to any person other then the accredited agent." So the marketing exclusivity in the ATC agreement would be amended by this legislation to prohibit preventing payment of sales commissions to any person other than the accredited agent. So it permits payment to companies such as Ticketron or other nontraditional systems that come up according to Judge Yoder's decision.

Mr. Edgar. Let me ask you, Tom, one final question. You said in your statement at one time that if we didn't pass Congressman Anderson's bill, that the industry will come to a halt. What do you mean by that?

Mr. Luken. No, I did not mean to say that, if that is the way it came out. I said that one of the possibilities, or one of the probabilities is that there would be litigation. That that litigation might well be very extensive which might bring about a bind within the agency, and actually in response to your other question, that kind of litigation could have a chilling effect upon development of innovations, just as well as the suggestion that you made that these agreements would be an impediment to developing innovations.

I mean sometimes innovations can be developed, and I think the indications are that they have been developed in this particular industry within the area of untrammeled, not untrammeled but more free kind of negotiations, freer kinds of agreements reached on a self-regulating basis by the people within the industry. That might permit more innovations than would occur if we are going to be bound by antitrust decisions coming out of the courts.

Mr. Edgar. I appreciate your response to the questions, and I think the real issue is how we can shape either this legislation or the present practice in order to protect that in a system that needs protecting and to allow for change what needs to be changed to provide for an innovative way of delivering services. It is a very tough question.

Mr. BONER. If the gentleman would yield, I think you have certainly raised a very good point. I know when I get into a strange city and I am sick, I look in the phone book under "Physicians." I know that when I look in the phone book under "Physicians," in my mind I tell myself that, if it were in the State of Tennessee, that this person who is listed under "Physicians" has a little bit of exclusivity themselves. They have earned the right to practice medicine. And in some areas, in a restricted area.

Well, I think what we are saying, is that exclusivity is not something that is a great requirement on a person. If there were requirements that were out of the ability to accomplish, what is it, 2 years' professional service, being bonded, and once you have reached those levels you are an agent.

We think it is in the best interest of the consuming public to know that when they look under travel agents, that there is some degree of expertise and certification that that person has attained to be able to be a travel agent. Those requirements in our opinion are not prohibitive and certainly not restrictive.

Mr. EDGAR. You make a good point. I am just hoping that when you look up "Physician" in the phone book that you can go to an accident ward or cheap clinic or expensive clinic or surgeon, that you can have all the variety of services provided, and that they are not all monolithic in their thinking. But I get your point. You don't want to "acupuncture" holes in the present system.

Mr. BONER. Right.

Mr. EDGAR. I yield my time.

Mr. MINETA. After that, you get no time.

Mr. Bosco.

Mr. BOSCO. Thank you, Mr. Chairman. I only want to make a brief remark.

I admire these gentlemen for defending an industry that all of us have in our districts, and most of us are hearing from in greater numbers, lately. But I think really the major question has been focused upon because there tends to be a propensity in this discussion to mix the question of professionalism, which we all admit the public benefits from, with the question of whether any group should be able to in effect fix and set prices.

Now, we have doctors, lawyers, real estate people—all of those people have been given degrees of professionalism through licensing and tests and whatever by the different States. But I don't know of any of those groups that is able to in effect fix a set price in terms of charging the public.

So I would think that—and you gentlemen don't have to answer this necessarily because we have already touched on it—but I think in terms of the testimony that comes in the rest of this hearing, it would be the industry's task to convince this committee as to how they differ from all of these other groups. If you don't differ, it doesn't seem to me they can really make the case even as much as everyone would want to protect them.

Mr. ANDERSON. You mention real estate. Real estate agents and brokers do have commissions that are fairly well set.

Mr. Bosco. They are in practice. I know in California it is 6 percent. It is not widely known, but each particular client of a firm may negotiate his or her own terms.

Mr. Luken. Under the regulations prior to the CAB decision, as of 1978, there were no agreements to fix commissions; none was permitted. I think that is totally irrelevant. I believe it is totally irrelevant.

I know there has been some discussion here carried on as if it were actually an issue involved in the legislation, but it is not. I mean, the facts are contrary. The CAB decided in 1978 no agreements affecting fixing of commissions. Any such agreements would have been illegal before this decision. They are just not on the table at the present time.

Mr. Bosco. I guess then I am not sure as to why the necessity for the legislation, if that is true.

Mr. Luken. Well, because of all the other aspects which we have discussed here, all the other aspects of preserving a system without getting into endless litigation. Of preserving a system which, though it has a certain amount of exclusivity on the surface, when one looks into it and how it operates, it is just the opposite. It is totally open. Anybody can join. It has been proven everybody does join. We have not heard one complaint about any kind of discrimination in the opportunity to join up.

So it is an exclusivity, as I tried to point out before, on any of these antitrust matters, you have to look at the case. The only standard that ever comes up is, is the particular agreement competitive or is it anticompetitive? All the testimony we have from everybody, except the business—what do we call them, the BTD's, except for them, everybody says this is an open system that is working. It is not exclusive. It is not anticompetitive. It is procompetitive. That is the way the system is worked out.

Mr. Anderson. It is a very complicated industry too. Suppose a senior citizen in Maine wants to travel to Eureka. He or she has to depend on somebody to know how to get them there. You just don't go down and push a couple buttons. You must have someone competant enough to figure how to get them there at the right time and at the lowest rate. We must depend upon the travel agents to give the best information.

Mr. Bosco. I think, Mr. Anderson, that there is absolutely no question that the public benefits from the professionalism of this group. I think, as I said before—and it might be necessary for Congress, in protecting that professionalism to grant antitrust immunity. I am not saying it isn't. But I think that is the issue, and we have focused on it very early in terms of this hearing.

Thank you. Thank you, Mr. Chairman.

Mr. Mineta. Thank you very much.

Well, let me thank Mr. Anderson, Mr. Boner, Mr. Luken for all the time that they have spent here. I think the fact that there have been some questions asked of you reflects the interest on the part of the members of this subcommittee and the seriousness with which they take your legislation. So I really appreciate the time that you have taken to be here.

Mr. Luken. We thank you for the committee's time.

Mr. Anderson. Thank you, Mr. Chairman.

Mr. MINETA. Thank you very, very much.

I am pleased to call on the Honorable Christopher DeMuth, Administrator for Information and Regulatory Affairs from the Office of Management and Budget.

Mr. DeMuth, we are pleased to have you with us.

Mr. DeMuth, the full text of your prepared statement will appear in the record at this point.

[Statement referred to follows:]

STATEMENT OF CHRISTOPHER DEMUTH, ADMINISTRATOR FOR THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET

Mr. Chairman and members of the subcommittee, I am pleased to appear and testify concerning H.R. 2053, the proposed "Air Travelers Security Act of 1983," which would reverse the Civil Aeronautics Board's decision in the Competitive Marketing Investigation.

The Administration enthusiastically supports the CAB's decision, which is entirely consistent with our policies of eliminating unwarranted government regulation of private commerce and judging business arrangements in competitive markets according to the principles of economic efficiency embodied in our antitrust laws. For these reasons, we are strongly opposed to H.R. 2053.

The premise of H.R. 2053 is that unregulated competition would have a destructive effect on the marketing of airline tickets. This view of market competition as an inherently destructive force was advanced with equal fervor, and unequivocally rejected, at the time the Airline Deregulation Act was passed in 1978. Subsequent experience demonstrated that market competition dramatically improved the performance of the airlines. In a period of economic recessions, steeply rising fuel prices, and general market uncertainty, most established airlines and their newer competitors have controlled costs better, adopted more efficient methods of operation, and offered passengers a wider range of fares and services than at any time under regulation.

H.R. 2053 reflects a desire to halt the deregulation process before it has completed its natural course. The result would be a schizophrenic system in which individual airlines were expected to make pricing and entry decisions in competition with other airlines, while similar competition in the distribution of airline tickets was restrained and these restraints were sanctioned by the government.

The suggestion that H.R. 2053 would permit competition is misleading. Under this bill, the airlines would collectively refuse to deal with any ticket agent who had not been approved to do business by the Air Traffic Conference (or the International Air Transport Association in international routes) or by the federal government. It is instructive in this regard to recall that even in the heyday of CAB regulation, competitive entry was permitted if its "need" could be "proven"—not to the satisfaction of the individual airline companies who were taking the financial risks, but to the satisfaction of regulators in Washington who were not. The administrative law judge's opinion that would be adopted as law by H.R. 2053 would continue such regulatory controls in an important part of our air travel industry. For example, the ALJ opinion itself concluded that certain firms were not "inappropriately excluded"—a regulatory, not a marketplace, decision. Only Ticketron was granted a regulatory "exemption," after a three-year proceeding in which it was required to prove to the satisfaction of the judge that its proposed service was "economically viable" and would not threaten the business of other travel agents. And Ticketron's entry was approved only with severe economic restrictions that would not apply to other agents, but would apparently apply to non-ATC agents who might be permitted to enter in the future—a classic example of the kind of government market-jiggering that has proven so futile so often in the past.

Thus, H.R. 2053 would replace a system that allowed no competitive entry with a system in which government-approved entry would occur to the extent that firms were willing to assume the substantial costs of winning government approval and could prevail over the opposition of existing firms. Experience with this kind of system during the past 40 years of airline regulation strongly suggests that it would stifle price and service competition and retard innovation in the face of changing market conditions.

Nor is the closed, regulatory system that H.R. 2053 contemplates necessary to protect consumers or to prevent chaos in air transportation.

For many years, conference agreements among the airlines and travel agents have contained "exclusivity clauses" stating that member airlines will compensate only conference travel agents for writing tickets. Because all major airlines are members of these conferences, the exclusivity clauses effectively prevent the marketing of tickets except through conference-accredited agents. While several aspects of the conference agreements appear to provide substantial economies in ticket marketing, exclusivity clauses adopted and enforced in concert by all carriers and agents are strongly anti-competitive and unnecessary to provide the benefits of the conference system.

By phasing out these exclusivity clauses, the Board is not threatening the beneficial aspects of the conference system or the economic viability of full-service travel agencies. Both the airlines and the travel agents have strong economic incentives for continuing the conference system. No other mechanism provides the airlines with comparable market access, or provides ticket agents with a comparable scope of transportation alternatives. By eliminating the need for every airline to negotiate with every travel agent, the conferences reduce the marketing cost of air transportation. Central processing of funds through area banks provides significant savings for both airlines and agents. Banks will continue to provide this service without exclusivity or antitrust immunity. To the extent that full-service travel agencies continue to provide important services to travelers, they will survive and prosper under the test of the competitive marketplace that other business men and women currently face every day.

Thus, the question is not whether the existing system has any desirable features, but why the airlines would give up the beneficial aspects of the conference system when they are simply required to eliminate easily severable anti-competitive restaints on decisions of individual carriers. In fact, the airlines have remained in the conferences despite many decisions of the Board over the years to eliminate various anti-competitive provisions. In the six months since the CAB's decision, airlines have already been free to negotiate individually, on a limited basis, with ticket agents. There has been no collapse of economically beneficial ticket distribution arrangements, nor is there any reason to expect such results when all anti-competitive restraints are removed in 1985.

An equally unsupported argument is that, under the CAB decision, airlines would discontinue interline arrangements, which account for a substantial amount of airline revenue. The interline agreements are distinct from the travel agent agreements and were not the subject of the Competitive Marketing Investigation. The lack of connection between the two is illustrated by the fact that airlines currently accept interline tickets freely even when they are not written by travel agents. The Board's decision carefully explained why and how airlines will continue to interline in the future without any required revisions to interline rules.

The Board's essential conclusion in its Competitive Marketing Investigation was that the provisions of travel agency agreements should face the same antitrust scrutiny as similar agreements among competitors in other industries. The Board has come to the same conclusion after reviewing other airline industry agreements in the past. Its policy, with which we are in full agreement, is that detailed regulatory oversight, required when an agency grants antitrust immunity, should give way to an economically rational antitrust policy, in which courts intervene only if true competitive abuses can be proven. Airline ticket settlement and interlining arrangements do not present antitrust problems—unlike the exclusivity clauses, they are not agreements among competitors not to compete along specified lines of service quality. (The inter-airline ticket settlement process has never had antitrust immunity and has never been challenged.) It may be that, here as in other industries, some vertical restrictions on product distribution are economically efficient and increase consumer welfare; if this is so, then here as elsewhere such restrictions ought not to be proscribed by the antitrust laws. To resurrect the ALJ decision in this case—which would sanction blanket restrictions that apply both horizontally and vertically across two entire industries, and necessitate government entry controls—would be bad for antitrust reform as well as a serious retreat from the policy of transportation deregulation the Congress has steadfastly adhered to for the past five years.

Mr. MINETA. Please proceed.

TESTIMONY OF CHRISTOPHER DeMUTH, ADMINISTRATOR FOR OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET

Mr. DEMUTH. Thank you very much, Mr. Chairman. It is a pleasure to be here this morning, and I appreciate your invitation that I testify.

The administration enthusiastically supports the CAB's decision, which is entirely consistent with our policies of eliminating unwarranted Government regulation of private commerce and judging business arrangements in competitive markets according to the principles of economic efficiency embodied in our antitrust laws. For these reasons, we are strongly opposed to H.R. 2053.

The premise of the bill is that unregulated competition would have a destructive effect on the marketing of airline tickets. This view of market competition as an inherently destructive force was advanced with equal fervor, and unequivocally rejected, at the time the Airline Deregulation Act was passed in 1978. Subsequent experience demonstrated that market competition dramatically improved the performance of the airlines.

H.R. 2053 reflects a desire to halt the deregulation process before it has completed its natural course. The result would be a schizophrenic system in which individual airlines were expected to make pricing and entry decisions in competition with other airlines, while similar competition in the distribution of airline tickets was restrained and these restraints were sanctioned by the government.

The suggestion that this bill would permit competition is misleading. Under this bill, the airlines would collectively refuse to deal with any ticket agent who had not been approved to do business by the Air Traffic Conference—or the International Air Transport Association in international routes—or by the Federal Government. It is instructive in this regard to recall that even in the heyday of CAB regulation, competitive entry was permitted if its "need" could be "proven"—not to the satisfaction of the individual airline companies who were taking the financial risks, but to the satisfaction of regulators in Washington who were not.

The administrative law judge's opinion that would be adopted as law by H.R. 2053 would continue such regulatory controls in an important part of our air travel industry. For example, the ALJ opinion itself concluded that certain firms were not "inappropriately excluded"—a regulatory, not a marketplace, decision.

Only Ticketron was granted a regulatory "exemption," after a 3-year proceeding in which it was required to prove to the satisfaction of the judge that its proposed service was "economically viable" and would not threaten the business of other travel agents. And Ticketron's entry in the end was approved only with severe economic restrictions that would not apply to other agents, but would apparently apply to non-ATC agents who might be permitted to enter in the future—a classic example of the kind of Government market jiggering that has proven so futile so often in the past.

H.R. 2053 would replace a system that allowed no competitive entry with a system in which Government-approved entry would occur to the extent that firms were willing to assume the substantial costs of winning Government approval, and could prevail over the opposition of existing firms. Experience with this sort of system during the 40 years of airline regulation strongly suggests that it would stifle price and service competition and retard innovation in the face of changing market conditions.

Nor is the closed, regulatory system that H.R. 2053 contempiates necessary to protect consumers or to prevent chaos in air transportation. In fact, I believe the facts are just the contrary.

For many years, conference agreements among the airlines and travel agents have contained exclusivity clauses stating that member airlines will compensate only conference travel agents for writing tickets. Because all major airlines are members of these conferences, the exclusivity clauses effectively prevent the marketing of tickets except through conference-accredited agents. While several aspects of the conference agreements appear to provide substantial economies in ticket marketing, exclusivity clauses adopted and enforced in concert by all carriers and agents are strongly anticompetitive and unnecessary to provide the benefits of the conference system.

By phasing out these exclusivity clauses, the Board is not threatening the beneficial aspects of the conference system or the economic viability of full-service travel agencies. Both the airlines and the travel agents have strong economic incentives for continuing the conference system. No other mechanism provides the airlines with comparable market access, or provides ticket agents with a comparable scope of transportation alternatives. By eliminating the need for every airline to negotiate with every travel agent, the conferences reduce the marketing cost of air transportation.

Central processing of funds through area banks provides significant savings for both airlines and agents. Banks will continue to provide this service without exclusivity or antitrust immunity. And finally, to the extent that full-service travel agencies continue to provide important services to travelers, they will survive and prosper under the test of the competitive marketplace that other businessmen and businesswomen currently face every day.

Thus, the question is not whether the existing system has any desirable features, but why the airlines would give up the beneficial aspects of the conference system when they are simply required to eliminate easily severable anticompetitive restraints on decisions of individual carriers. In fact, the airlines have remained in the conferences despite many decisions of the Board over the years to eliminate various anticompetitive provisions.

In the 6 months since the CAB's decision, airlines have already been free to negotiate individually, on a limited basis, with ticket agents. There has been no collapse of economically beneficial ticket distribution arrangements, nor is there any reason to expect such results when all anticompetitive restraints are removed in 1985.

An equally unsupported argument is that, under the CAB decision, airlines would discontinue interline arrangements, which account for a substantial amount of airline revenue. The interline agreements are distinct from the travel agent agreements and were not the subject of the competitive marketing investigation at all. The lack of connection between the two is illustrated by the fact that airlines currently accept interline tickets freely even when they are not written by travel agents. The Board's decision carefully explained why and how airlines will continue to interline in the future without any required revisions to interline rules.

The Board's essential conclusion in its competitive marketing investigation was that the provisions of travel agency agreements should face the same antitrust scrutiny as similar agreements among competitors in other industries. The Board has come to the same conclusion after reviewing other airline industry agreements in the past. Its policy, with which we are in full agreement, is that detailed regulatory oversight, required when an agency grants antitrust immunity, should give way to an economically rational antitrust policy, in which courts intervene only if true competitive abuses can be proven.

Airline ticket settlement and interlining arrangements do not present antitrust problems—unlike the exclusivity clauses, they are not agreements among competitors not to compete along specified lines of service quality. The interairline ticket settlement process has never had antitrust immunity and has never even been challenged. It may be that, here as in other industries, some vertical restrictions on product distribution are economically efficient and increase consumer welfare; if this is so, then here as elsewhere such restrictions ought not to be proscribed by the antitrust laws.

To resurrect the ALJ decision in this case—which would sanction blanket restrictions that apply both horizontally and vertically across two entire industries, and necessitate Government entry controls—would be bad for antitrust reform as well as a serious retreat from the policy of transportation deregulation the Congress has steadfastly adhered to for the past 5 years.

Thank you.

Mr. MINETA. Thank you very much, Mr. DeMuth, for your testimony. And I would also like to thank the Director for the letter that he sent explaining the administration's position on H.R. 2053.

As I indicated in my opening statement, Mr. DeMuth, supporters and opponents of the Board's decision both appear to agree that the current ATC system brings substantial benefits for airlines, travel agents and the traveling public. The central issue which divides them is whether these benefits are likely to be preserved if there is an end to exclusivity and if there is a withdrawal of antitrust immunity from the agreements. So I have several questions on this.

First of all, do OMB and the administration agree that the current system of travel agents produces substantial benefits for airlines, consumers and the traveling public? And could you explain what those major benefits are?

Mr. DEMUTH. The existing system does provide benefits, and the representatives who were up here before me described many of these in detail. We don't quarrel with that at all.

Our essential point is that to the extent that they do provide benefits, they should have no fear of the competitive marketplace at all. Benefits which are worth their cost to consumers survive and do well in the private market. There is no need for us in Washington to sit back and second-guess what kinds of services are the kinds of services people really need.

In an industry such as this one that is naturally competitive, where there are no dominant economies of scale or other tendencies which lead to non-competitive markets, we can leave these decisions to consumers themselves.

Mr. MINETA. Then on that latter point, Let me ask a little more specifically. I would like your position on the effects of withdrawal of Government approval for exclusivity provisions in which the airlines promise not to use agents who do not meet ATC criteria and do not comply with ATC rules on doing business.

If use of ATC agents is made voluntary, do you think airlines will continue to rely extensively on ATC agents?

Mr. DEMUTH. Yes, sir, I believe they will. The only question is whether, if some airlines and some new innovators in the industry want to try a somewhat different approach, they should be permitted to. But I have no doubt that the current system will continue to provide benefits that it does today.

Mr. MINETA. Then I would like to nail down the administration's position on the effects of withdrawal of antitrust immunity.

In Director Stockman's comments on H.R. 2053, he stated on behalf of the administration that, "The benefits of the conference system will continue without antitrust immunity because both the airlines and the travel agents have strong incentives for continuing it." End of quote.

Is it the administration's position that the antitrust laws would not prohibit the continuation of essential provisions of the ATC agreement? In general, what are the types of provisions that would be continued without violating the antitrust laws?

Mr. DEMUTH. The essential problem of the exclusivity clauses in the conference agreements the CAB looked at was their horizontal aspects. That is, all of the airlines were agreeing that no one of them would offer services through agents in any way other than under its agreement with its competitors. This is a horizontal restraint of trade, and presents obvious difficulties under the antitrust laws.

The core provisions of the conference agreements, many of which have been discussed this morning in the CAB's decision itself, seem to me to present no difficulties whatever under the antitrust laws—the area settlement plan, for example, and some of the accreditation standards.

When it comes to the question of vertical restrictions, in particular the extent to which airlines ought to be permitted to condition the retail sale of their services, we get into an area that is somewhat more complex. I will leave this to Mr. Baxter, who I believe is going to be testifying before you later on.

But the parameters of the problem are well-known. We do not believe that the vertical restrictions which currently obtain in this industry, which appear to be economically efficient, ought to present any problem under the antitrust laws.

Mr. MINETA. One of the main arguments which has been made against the CAB decision comes down to the slogan that we have heard so much this morning: "If it ain't broke, don't fix it." In the present context, this means that we now have competition by roughly 22,000 travel agents who are providing a system which provides substantial benefits to the airlines and the public.

The argument goes on to state that if there is even a small chance that these agreements will collapse without antitrust immunity, we shouldn't take that chance.

I would appreciate your comments on this argument.

Mr. **DeMuth**. Well every industry in the country can probably offer arguments about the benefits that it is offering and why it could offer even more if it wasn't subject to the antitrust laws.

In the past several years, Congress has heard arguments such as this in one industry after another, but I am not aware that any industry has collapsed as predicted when the antitrust immunity was removed. I think it is bad for antitrust law and bad for the problems of regulatory growth that whenever there is a disagreement about some interpretation of the antitrust laws, the solution should be to exclude from the operation of those laws people who can get into Washington and argue for some kind of special treatment.

The antitrust laws have always been intended to apply broadly to the circumstances of all industries. I see nothing in the arguments that are offered in this case concerning the structure or nature of the travel agency relationship, or the nature of the sale of airline travel, that suggests that this market is the kind that should not have the antitrust laws apply to it. Antitrust applies to many other industries with similar characteristics.

So the answer to the "it ain't broke" argument is that the burden of proof ought to be on those who think that the law should apply differently to them than it does to most people in the Nation.

Mr. **Mineta**. The opinion has been expressed over whether the system of interlining will survive under the Board's decision. One of the concerns is that interlining depends on each airline having confidence in the agents used by other airlines.

Do you think this confidence will exist if the airlines are able to use agents who do not meet ATC criteria? Do you think that withdrawal of Government approval for exclusivity and withdrawal of antitrust immunity of the ATC agreements threatens the interline system?

Mr. **DeMuth**. No, sir; it will have no effect on interlining. As I mentioned in my testimony, airlines already respect tickets not written by agents. The interlining agreements were not a subject of the CAB proceeding at all. We have interlining agreements in other transportation and communication industries in the United States, without the kind of restrictive entry provisions at issue here. And I have never been aware of any kinds of problems such as those that have been asserted.

And as far as the Board's decision is concerned, these agreements have never had antitrust immunity and don't present problems there. I don't think that the removal of immunity for the exclusivity provisions will have any effect, either.

Mr. **Edgar**. Would the chairman yield?

Mr. **Mineta**. Surely.

Mr. **Edgar**. I thank the chairman for yielding. It is to this question that I was patiently waiting to zero in.

I would like to take the other side of the question that I raised with the panel that was on previously. That is, using the medical illustration.

How do you prevent the witchdoctors from getting into the system? How would you see the system operating so that those who not only didn't meet the standards but, in fact, gave fraudulent or bad advice to the traveling public, would be excluded from the system?

Mr. DEMUTH. I think that the airlines have powerful incentives for policing against frauds and incompetents. The agents are to an important degree public face of the airlines themselves.

Mr. EDGAR. What about the consumer?

Mr. DEMUTH. It is hard to imagine that we could add much to the incentives the airlines already have not to trust their ticket stock and reputations with swindlers and cheats.

Mr. EDGAR. Would you think that would protect the consumer, as well? I know why the industry, and why the airline industry particularly, would protect itself from the witchdoctors and those who were giving bad medicine.

Mr. DEMUTH. Yes.

Mr. EDGAR. But what about the unsuspecting consumer? How would they know that——

Mr. DEMUTH. To some extent the airlines' interest and interest of the general consumer would be congruent. That is to say, if the airlines saw that somebody was defrauding people or engaging in other activities that would reflect on the airlines, it would be in their best interest to take corrective action. Beyond this, we have in this country criminal, civil, and regulatory laws against consumer fraud and deception, and they are intended to protect the consumer in situations such as the purchase of travel services where the consumer comes in, doesn't really know that much about what he or she is buying, is relying in part on the advice of a stranger about far-off places, and so forth.

You can imagine that there would be a potential for consumer problems here and that some amount of government antifraud activity would be appropriate. But, of course, we have that. It applies to many similar markets such as advertising markets, and I don't see any reason why it should not be the policy of choice here, as well.

Mr. EDGAR. I have an additional question, but I yield back to my Chairman.

Mr. MINETA. You can have that one on your own time.

Mr. EDGAR. OK. Thank you.

Mr. MINETA. Before the administration took its position in supporting the CAB's decision, did you consider the views of the travel agent associations who opposed the legislation?

Mr. DEMUTH. Yes, sir. We studied the record of the proceeding at the CAB, both before Judge Yoder and before the CAB itself. We looked at materials that had been submitted to the administration directly from numerous private parties, including the travel agents and from Members of Congress.

Mr. MINETA. You state in your testimony that the administration is, quote, "strongly opposed," unquote, to H.R. 2053. You state that you are in full agreement with the Board's approach on this issue. Mr. Stockman used similar words in his letter of June 30 expressing the views of the administration on this bill.

At this point, without objection, I would like to make this letter from Mr. Stockman a part of the record.

[The letter from Mr. Stockman follows:]

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., June 30, 1983.

Hon. JAMES HOWARD,
Chairman, Committee on Public Works and Transportation,
House of Representatives, Washington, D.C.

DEAR JIM: This is in response to your request for the Administration's views on H.R. 2053, a bill "[t]o assure the continued protection of the traveling public in the marketing of air transportation, and for other purposes."

The Administration opposes this bill. It is inconsistent with our program to eliminate regulatory barriers to competition, and contrary to the direction set by Congress in the Airline Deregulation Act of 1978—an Act passed with wide bipartisan support.

H.R. 2053 would reverse the Civil Aeronautics Board's recent decision (in the Competitive Marketing Investigation) opening the marketing of air transportation tickets to competitive entry. For many years, conference agreements among the airlines and travel agents have contained "exclusivity clauses" requiring member airlines to market their tickets exclusively through member travel agents. Because all major airlines are members of these conferences, the exclusivity clauses effectively prevent the marketing of tickets except through conference-accredited agents. While the conference agreements as a whole appear to provide substantial economies in ticket marketing, the exclusivity clauses are fairly clear violations of the antitrust laws and could not be maintained absent CAB approval and resulting antitrust immunity.

In reaching its recent decision, the Board found that the exclusivity clauses were anti-competitive and unnecessary to provide the benefits of the conference system. It also found that the conference agreements were not per se anti-competitive, but that their provisions should face the same antitrust scrutiny as similar agreements among competitors in other industries. Based on these findings, the Board withdrew its approval of exclusivity clauses applied to single-line tickets immediately, and announced that its approval of exclusivity clauses applied to joint-line tickets, and antitrust immunity generally, would be withdrawn at the end of 1984—a delay that will permit an orderly transition from regulated to competitive ticket marketing.

Section 412 of the Federal Aviation Act requires the CAB to disapprove any agreement unless it finds that the agreement "is necessary to meet a serious transportation need or to secure important public benefits . . . , and it does not find that such need can be met or such benefits secured by reasonably available alternative means having materially less anti-competitive effects." In the 40,000 pages of testimony and exhibits of the Competitive Marketing Investigation, the Board could find no compelling evidence that travel agent exclusivity provided an important public benefit not otherwise available. Instead, the Board found that exclusivity only protected the travel agents from other forms of competition, such as discount ticket offices or automatic ticketing machines. The Board members concluded, and we agree, that Section 412 and good public policy required the Board to discontinue exclusivity. Their decision will subject the sale of air transportaiton to the tests of market competition. We expect that the economic benefits of the free market experienced in other deregulated industries will be repeated in the marketing of air transportation.

By phasing out exclusivity, the Board is not destroying the travel agent system. In fact, the Board approved the common accreditation system and the area settlement plan. The standards for accreditation relating to competency, honesty, security, and location have not changed at all. The Board did question whether some of those standards were too stringent, but left that for the airlines and the agents to examine.

The benefits of the conference system will continue without antitrust immunity because both the airlines and the travel agents have strong incentives for continuing it. No other mechanism provides the airlines with comparable market access, or provides ticket agents with a comparable scope of transportation alternatives. By eliminating the need for every airline to negotiate with every travel agent, the conferences reduce the marketing cost of air transportation. They can continue to provide this service without exclusivity or antitrust immunity.

We believe the Board made the right decision—one that is not only consistent with, but essential to, the policy set by Congress in the Airline Deregulation Act of

1978. The Administration is strongly opposed to H.R. 2053 or any similar attempt to reverse the Board's decision.

Sincerely,

David A. Stockman, *Director.*

Mr. Mineta. If the provisions of H.R. 2053 were sent to the President's desk by the Congress, is it your expectation that OMB would recommend veto of this legislation?

Mr. DeMuth. Yes, sir, it is.

Mr. Mineta. Thank you.

Mr. Hammerschmidt.

Mr. Hammerschmidt. Thank you, Mr. Chairman.

Let me pursue a little further one of the chairman's inquiries. During the course of CAB's competitive marketing investigation, many agencies of the Federal Government participated in those hearings, including DOT and the Justice Department.

Did OMB take a position during the Board's deliberation?

Mr. DeMuth. No, sir, we did not.

Mr. Hammerschmidt. I was going to ask the veto question, but the Chairman has already asked that. You clearly responded to it.

You have also alluded, at least to the response to this question—let me ask it more specifically. According to the CAB's written testimony, travel agents represent a number of bus companies, hotels, tour operators, and rental car companies, without any Government regulation similar to that which exists in the airline industry.

Do you believe that the airline industry is substantially different from these other industries to justify maintaining the exclusivity provisions and antitrust immunity which have long governed the airlines' marketing agreements?

Mr. DeMuth. No, sir. It seems to me they are essentially similar.

Mr. Hammerschmidt. We talked about the marketing of interline air transportation. I wonder why airlines have not entered into any agreements authorizing the sale of either online or interline tickets through other agents? Do you have any opinions as to why the airlines have not taken advantage of this opportunity?

Mr. DeMuth. Sir, I don't follow your question.

Mr. Hammerschmidt. One of the less talked about parts of the CAB decision which we were discussing earlier was that it also allowed carriers to agree on alternate forms of marketing for interline air transportation; although it would not officially eliminate either exclusivity for interline air transportation or antitrust immunity until the end of 1984. So why haven't the airlines used it?

Mr. DeMuth. I just can't answer that question. I really don't know, sir.

Mr. Hammerschmidt. In its written testimony, CAB included a quote from an editorial which appeared in Travel Trade magazine concerning United Airlines' plan relating to travel agents' commissions. Apparently, agents reacted bitterly to United's proposal for a flat commission rate.

I would like to read to you a quote from that editorial:

> It is—the editor's—hope that this experience taught every airline that when you try to take something away from travel agents which is rightfully theirs, you run the risk of having agents place their tickets with those carriers which do place a high value on the travel agency sales distribution system.

I wonder if you could comment on this and give us your views as to whether this attitude exists throughout the travel agent industry.

Mr. **DeMuth**. I think that where two industries work so intimately with each other, and there is a strong mutuality of interests, then although there will be occasional disputes between the two industries, they will still continue to be solicitous of the interests and welfare of the others.

Mr. **Hammerschmidt**. One of the criticisms we have heard about the CAB's decision is that it would allow anybody to sell airline tickets, including the grocery store down the street; that consumers would ultimately be harmed since they would be getting travel advice from those without adequate experience.

Do you want to comment further on that question?

Mr. **DeMuth**. Yes, sir. The view that people out across the United States just can't take care of themselves, and will be letting their grocers plan their trips for them if we leave them free to make decisions for themselves, is a view I think has very little to recommend it.

In the case at hand, it seems to me that those travel agents which offer services that the customers really want, whether full line or no frills, in the long run are going to be the ones to prosper. Although it is an industry where consumers sometimes will be going in and buying something that they don't know much about in advance, that the airline industry itself has very strong incentives for having its tickets marketed through reputable and reliable, honest individuals.

I see no reason to suspect that market competion is going to lead to frauds and swindlers taking over this industry. We have lots of industries in the United States that don't have antitrust exemption. We haven't seen this problem arise. I don't think we would here, either.

Mr. **Hammerschmidt**. Thank you, Mr. DeMuth, for your testimony and for your responses.

Mr. **Mineta**. Mr. Edgar.

Mr. **Edgar**. Yes.

Just getting back briefly to the question I asked earlier when I interrupted the chairman about the fraudulent people getting into the system, isn't it true that under the Board's decision there would continue to be a system of accreditation of travel agents?

Mr. **DeMuth**. Oh, yes. The Board did not ban accreditation. It simply said that the airlines may individually do business through distributional arrangements outside the accreditation procedures if they find it in their interest.

Mr. **Edgar**. Do you know much about the system prior to the institution of the Air Traffic Conference agreement?

Mr. **DeMuth**. No, sir.

Mr. **Edgar**. Do you have any idea as to why the Air Traffic Conference agreement system was put in place?

Mr. **DeMuth**. I would rather leave that to the Board itself. I think they can give you more background.

My general understanding is that the conference agreement was an outgrowth of the whole system of closed and controlled air transportation in this country since the 1930's.

Mr. Edgar. What kind of people distributed the tickets before the conference agreement?

Mr. DeMuth. I would like to leave that to the Board, if I may.

Mr. Edgar. There is a footnote that is kind of interesting in the judge's decision. It says:

> Prior to the development of a domestic industry travel agent program, the airlines individually used many methods of distributing their tickets to the general public. Tickets were given with almost no restriction or controls to hotel porters, bell captains, boot blacks, taxi drivers, barbershop proprietors and virtually anyone else the airline felt had a chance to sell their product. The use of such nonprofessionals had the potential to, and did, in fact, cause great disservice to the traveling public and the airlines. The Board found that the situation was unsatisfactory and often resulted in the abuses and mistreatment of the traveling public.

It seems to me that from an investigation that was made as to the process, they tried to develop an orderly system. I think the question we are raising today is: Should that orderly system that is in place be changed so that more innovation can take place within the system without having abuses tacked on to that system?

Mr. DeMuth. Sir, if I may say in response, it is characteristic of the early years of any industry that there are a lot of new people coming in. Things are quite messy and chaotic. There is a lot of swashbuckling promotion, and so there is a lot of fraud.

I would want to know whether the ALJ's footnote describes early, barnstorming years of aviation in the United States.

The kinds of problems which the ALJ apparently alluded to are typical at the beginning, but usually the marketplace responds. Organizations are set up to provide a certain amount of credibility to consumers—that have well-understood names, and marketing techniques. They develop a reputation with consumers that has value and people start to do business with them.

The issue in this proceeding is not whether it is appropriate for this industry to have such arrangements that will give the traveling public assurances of integrity. The question is whether the arrangements require antitrust immunity from the Federal Government.

We have many industries in the United States with accreditation procedures, brand names, and other market techniques for giving assurances to consumers for policing fraud that operate without antitrust immunity.

I am sure that there were some rocky days in the early days of the air travel business. But with the mature, well-developed travel industry we have today, with large firms with millions of dollars at stake in the reputation that they have with the consumers, the idea is highly implausible that we would somehow descend to a state of nature if the industry, like others, had to live under the antitrust laws.

Mr. Edgar. I really appreciate your response to that question. We heard earlier the comment, "if it ain't broke, don't fix it." But I am not sure that applies here because, as you mentioned, there has been a great deal of change.

If we had put that particular statement to a number of early transportation decisions, we would have not moved from buggies to automobiles, or from trains to airplanes, and moved on in the system.

I am not sure that the case can be made that just because there is nothing wrong, that the system does not need change. I do, however, think that some protection has to be placed within the realm of the decision that the CAB has made so that there is protection to the consumer as well, that the airlines don't begin to find another way to challenge the system.

I was here at hearings earlier when we dealt with the computer process. I am still startled by some of the things we discovered taking place in the whole computer industry on how airline tickets and flights are booked. I think there are some real questions there. The airlines have not been innocent bystanders in many respects in terms of the issue of competition.

I appreciate your testimony and your response to my questions.

Mr. MINETA. Mr. Anderson.

Mr. ANDERSON. Thank you, Mr. Chairman.

Mr. DeMuth, is the OMB speaking here for the administration?

Mr. DEMUTH. Yes, sir.

Mr. ANDERSON. Does that include the Department of State, the Department of Transportation, and the Department of Justice?

Mr. DEMUTH. Yes, sir, although I should add that Justice and Transportation are testifying also, and will explore other aspects of our position such as technical antitrust issues.

Mr. ANDERSON. I am interested if you are speaking now for the Department of State and Transportation, with the understanding that they will be testifying later.

Mr. DEMUTH. Yes, sir.

Mr. ANDERSON. But what was the position of the State Department before the CAB? Didn't it ask CAB to dismiss the case as regards the IATA agency agreements? In other words, it favored antitrust immunity for the IATA agency.

I have with me a copy of IATA's testimony before the CAB. Their position was, and continues to be just exactly what I just told you. They wanted antitrust immunity for IATA agents.

Are you telling me now that the State Department has changed its position, and now favors the removal of antitrust immunity from the IATA agreements?

Mr. DEMUTH. Sir, it is not infrequently the case that foreign governments have difficulty doing business under our antitrust laws. I believe that in this case, the State Department advocated exemption in the international markets for that reason.

Mr. ANDERSON. In other words, the answer to my question would be yes, that the State Department has changed its position, then, and now favors the removal of antitrust immunity from IATA agreements?

Mr. DEMUTH. Yes, sir.

Mr. ANDERSON. OK. How about the Department of Transportation; what was its position before the CAB?

Mr. DEMUTH. In detail? I mean, they——

Mr. ANDERSON. Did they oppose exclusivity?

Mr. DEMUTH. Right.

Mr. ANDERSON. Including certain ATC rules?

Mr. DEMUTH. Right.

Mr. ANDERSON. But they favored antitrust immunity for agreements if they were cleaned up as the DOT proposed.

Has the Department of Transportation reversed its position and do they not favor immunity today?

Mr. DeMuth. Yes, sir, that is right.

Mr. Anderson. They have reversed their position then?

Mr. DeMuth. Well, you know I have not read——

Mr. Anderson. I just want to make sure you are speaking for them because if you are telling us that you speak for the administration, it must include the Department of Transportation.

Mr. DeMuth. I am speaking for the administration. The departments can speak for themselves as to the particulars of their presentations before the CAB.

The extent to which certain aspects of these agreements would fit or would not fit under the antitrust laws are things which we can debate about. But as to our position on this bill, the position of all the departments you mentioned is clear.

Mr. Anderson. Let me get this straight, does the Department of Transportation oppose or support antitrust immunity?

Mr. DeMuth. Opposed to immunity.

Mr. Anderson. What about Department of Justice? Did it not tell Judge Yoder that the agency agreements would be anticompetitive even with exclusivity entirely removed? I have a statement which shows this to be the case.

Mr. DeMuth. All aspects of the agreements? I can't believe they said that.

Certain parts of the agreements just don't present any questions at all under the antitrust laws.

Mr. Anderson. They said the agency agreements would be anticompetitive even with exclusivity entirely removed.

Mr. DeMuth. I would want to look at the details of that because certainly there are parts of the agreements, such as the stringency of the accreditation procedures, which are matters of judgment under the antitrust laws. There is no per se rule one way or the other.

I believe the Justice Department was critical of certain aspects of conference agreements going beyond the exclusivity clauses, but I would be surprised if there was any blanket condemnation of every aspect of the agreements.

Mr. Anderson. Is it OMB's understanding that prior to the board's decision on the agency agreements, that BTD's have been given the freedom to negotiate any kind of discount that they wanted, either to reflect the volume of their procedures, or to reflect that they do their own ticketing, or on any other basis?

Mr. DeMuth. That is true, but that is only part of the story, of course. The BTD's may not be agents. They may not receive commissions for doing precisely the kind of work that ticket agents do.

They can get volume discounts but the inventory carrying aspects of the agreements would be very different. They can do some things but they cannot do many things which ticket agents can do.

Mr. Anderson. But they can get discounts. They might even get tickets at prices considerably less than what a travel agent could sell the ticket for to the public.

Mr. DeMuth. It depends. They could negotiate——

Mr. Anderson. If an airline sells a BTD a ticket that is considerably less than that offered to the public, less the agent's commission, how in the world could you expect to give them a commission on top of that?

Mr. DeMuth. If they decided that, of course you wouldn't. But commissions and volume-discounts are two very different kinds of agreements.

You point out they can make one kind of agreement. The question is, why should the Federal Government approve private horizontal arrangements among the airlines not to engage in the other kinds?

Mr. Anderson. Of course, the BDT's are customers of the airlines. That is one reason why you don't give a person a commission for selling themselves a ticket. You do give them a discount. You give them the lowest price they can bargain.

You don't get a commission on top of that.

Mr. DeMuth. No.

Mr. Anderson. Thank you, Mr. Chairman.

Mr. Mineta. Thank you very much.

Mr. Bosco.

Mr. Bosco. Mr. DeMuth, if, say, an airline, or for that matter, any company wants to go to court, is that company free to deal with almost anyone to go to court, or must they hire a licensed attorney?

Mr. DeMuth. Well, the essential answer is they must hire a licensed attorney, though not without exception.

Mr. Bosco. What I am having a difficult time understanding is what element of all this is the immunity necessary for.

If an airline wants to hire an agent to sell its tickets, apparently it must hire someone who is accredited to deal with the public in that regard at present, or I mean this is what we need the immunity for.

Mr. DeMuth. I don't know why the immunity is necessary. As you know, lawyers are not immune from the antitrust laws. When some aspects of the canons of legal ethics appeared anticompetitive, the Justice Department has frowned and even gone to court.

But nobody, I believe, has ever suggested that the basic idea of accrediting lawyers or doctors is in violation of antitrust laws. I don't think that the general procedure of accrediting travel agents would itself be considered to violate the antitrust laws, so I don't really see the relationship here.

Mr. Bosco. Looking at it the other way, if you allow the airlines to go to whomever they wish to sell their tickets, in effect you are rendering meaningless the accreditation process, aren't you?

Mr. DeMuth. No, sir, I would propose that the accreditation process be subjected to a market test of its benefits.

Mr. Bosco. Yes, but we don't subject the legal profession to a market test. I mean, the public can't decide, well, there are certain people that understand laws as well as lawyers do, and they charge a lesser fee, so I am going to go to that person.

So why would we change that for travel agents? Is there not some benefit to society to say that we are going to allow certain professionals to deal in this and not allow others who aren't professionals to deal in it?

Mr. DeMuth. The question whether a court should object if somebody who is not a member of the bar of that State wishes to come in and practice before the court seems to me to presents somewhat different issues. I could imagine an argument that maybe that would be a good thing, it would be an interesting debate in the abstract.

But it seems to me unexceptional to say that airlines ought to be able to do business with people who were not accredited, because they have very strong interests themselves in choosing proper people to be the marketers of their tickets. Why shouldn't we let them do it?

Mr. Bosco. Well, in effect, though, what you are saying is let the airlines be the judge of professionalism. Yet I think a case can be made for the necessity of Congress to decide what best protects the public.

Obviously airlines have an interest in people getting good travel advice. But they may also have an interest in, for one reason or another, finding the least expensive alternative. That may not end up protecting the public.

As you mentioned, the accreditation is not technically harmed by loss of antitrust immunity, but in a practical sense, it seems to me it would be rendered almost impotent, whereas in other professions, we don't give the public a choice. We say, "If you want to have brain surgery, you must go to a licensed M.D. If you want to go to Federal court, you must go through a person who has been admitted to practice before the court, unless you go on your own behalf."

That is done to protect the public.

Mr. DeMuth. Yes.

Mr. Bosco. Do you feel this is a lesser need for protection?

Mr. DeMuth. No, sir.

Mr. Bosco. And more subject to the marketplace?

Mr. DeMuth. Than brain surgery? Yes.

Mr. Bosco. So that is basically the nexus of what you are saying, that——

Mr. DeMuth. The Federal Government and States license all sorts of things, from brain surgeons and jet pilots to people that put mud packs on your face and manicure your fingernails, and lots of other things. The extent to which professional licensing is something that is good or bad for consumers cannot be answered with any blanket judgment.

Mr. Bosco. So you take each industry one by one?

Mr. DeMuth. I think you have to take them as they come.

I would think any review of Judge Yoder's decision would be very depressing to a Member of Congress who was thinking that maybe the Federal Government should decide what the terms and conditions of travel agencies should be in the United States. It would seem to me very discouraging to contemplate putting in the Federal code that people have to work 35 hours a week if they are going to be able to sell airline tickets in the United States.

That seems to get to a level of commercial detail, not involving problems of expertise, rarified knowledge, or threats to public health and safety, where I think we can let the market decide how many hours a week people that sell tickets ought to be able to remain open.

Mr. Bosco. Would it be accurate to say the administration recognizes in some cases the necessity for complete accreditation and no access outside of accreditation, and in other industries, on a purely subjective basis, the administration believes the work that they do is such that you can open it up to nonprofessionals or virtually anyone that gets the sanction of whoever it is that happens to be selling the product.

Mr. DeMuth. Yes, sir. As someone who holds down the administration's deregulatory principles, I want to say that we are firmly in favor of Federal certification of commercial airline pilots.

Mr. Bosco. Well, thank you.

Mr. Mineta. There being no further questions, Mr. DeMuth, let me thank you very much for your presence here and for your testimony on behalf of the administration.

The subcommittee will stand in recess until 2 p.m.

[Whereupon, at 12:48 p.m., the subcommittee recessed, to reconvene at 2 p.m., this same day.]

Mr. Mineta. The subcommittee will please come to order.

We are pleased to have the Honorable James C. Miller III, Chairman of the Federal Trade Commission, to testify this afternoon.

Mr. Chairman, we have your testimony, and the full statement will be made a part of the record.

[Statement referred to follows:]

Statement of James C. Miller III, Chairman, Federal Trade Commission

Mr. Chairman and members of the subcommittee, I appreciate this opportunity to appear before you today on behalf of the Federal Trade Commission (FTC) to express the Commission's views on H.R. 2053, the proposed "Air Travelers Security Act of 1983."

I am especially pleased to be here because airline regulatory reform has been of continuing interest to me over the years. As you may know, I have written and testified widely on this topic. In 1974, for example, I collaborated with Dr. George Douglas, now a Commissioner of the FTC, in a Brookings book on the effects of economic regulation of domestic airlines.[1] And while associated with the American Enterprise Institute, I was employed by the Civil Aeronautics Board's (CAB's) Bureau of Domestic Aviation to testify in the proceding that was the genesis of the bill at issue. On the basis of this research, I conclude strongly that adoption of H.R. 2053 would be contrary to the public interest.

Let's examine a few of the more salient features of the proposed legislation. H.R. 2053 would reverse a decision by the Presidentially-appointed Members of the CAB and restore the decision of the Administrative Law Judge (ALJ). The Board concluded that in this new deregulatory climate, the air carriers should have the right to market their services any way they choose—selling direct, through travel agents, or through other vendors. The Board's decision also phases out the antitrust immunity carriers presently enjoy collectively to accredit travel agents and establish a clearinghouse for accounts.

The ALJ, on the other hand, would retain current agency exclusivity provisions. This means that an airline may not have a sales agency relationship with anyone other than an accredited travel agent. The ALJ would also continue antitrust immunity for agreements pursuant to the accreditation of agents and the settlement of accounts.

There are several problems with the ALJ's decision, which the proposed legislation would affirm. Some features of the present accreditation system, which the ALJ's decision would keep largely intact, are anti-competitive. For example, the Air Traffic Conference requires that travel agency locations be freely accessible to the public and that the agency be engaged solely in the promotion and sale of passenger transportation and general travel service. This would keep out agencies that might best serve the consumer by operating by telephone, or by focusing their sales efforts on particular types of passengers. A requirement that a sales manager have extensive "promotion" experience would keep out agencies that concentrated on ticketing and not on the dissemination of information.

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[1] George W. Douglas and James C. Miller III, *Economic Regulation of Domestic Air Transport: Theory and Policy* (Washington: The Brookings Institution, 1974).

What you have, then, is a system where only those types of retailers that all airlines agree serve their joint interests are able to sell air travel. The net result is that traditional travel agents are virtually the only marketers of air transportation, other than the airlines. Competition is reduced because the potential for different forms of distribution is eliminated. Individual carriers have little or no incentive to find a superior way to market tickets, and travel agents have only limited incentives to explore new marketing techniques. Consumers are the ultimate losers because they have fewer options.

The ALJ did recognize the need for new marketing alternatives. But he foresaw these new alternatives as acting only in a non-agency capacity, perhaps merely dispensing tickets without representing all airlines or giving travel advice.[2] Other parties interpreted his opinion even more narrowly. The International Air Transport Association suggested that such a distributor would have to assume the responsibiity for the airlines' performance to make it clear that the distributor was not an "agent".[3]

The ALJ's decision, then, would allow some alternatives, but would prohibit these new retailers from assisting purchasers by providing fare and route information.[4] In so doing, it would create specific artificial restraints on marketing forms. Acceptance of the ALJ's decision, as this legislation would impose, would entail continual legal controversy over whether a retailer were unlawfully acting as a full-fledged agent or merely dispensing tickets.

Please do not interpret my comments as suggesting that neither airlines nor travel agents are competitive. They most surely are. The Airline Deregulation Act intensified that competition.

However, because of lingering restraints the industry is not realizing its full potential to serve the public interest.

Perhaps an extreme example will illustrate: If Congress were to enact a law that prohibited the manufacture of all but navy blue clothing, unit costs would be low and there would be substantial competition in both manufacture and retailing of apparel. However, one would not conclude that the industry was performing well in the sense of satisfying consumer preferences. Nor would one conclude that the industry was without substantial competitive restraints. So while the travel industry may boast of continued growth in the number of travel agent locations, I would ask whether the services being provided and the forms of marketing being used are those most desired by consumers.

One may well ask why there is both travel agent and airline opposition to the Board's ruling. Some travel agents may fear that an end to exclusivity would decrease the demand for their services if a superior type of marketing service came along. Some air carriers may fear that absent exclusivity they would experience a decrease in demand for direct, "easy" sales to consumers—the sales they make when the consumer knows the rate and the route and simply calls the airline directly. These fears, however, do not justify retaining the current system if the effect is to penalize competition and consumer choice.

Would the lack of a prohibition against use of nonaccredited sales agents mean that consumers would be thrown to the wolves? No! Does anyone seriously expect airlines to entrust their ticket stock and their good names to just anyone?

Would end to the current prohibition mean that accredited agencies would die off? No! Everyone agrees there are efficiencies involved with a system of accredited agents. Such efficiencies would assure the survival of this segment of the retailing industry.

But can such a system survive without antitrust immunity? To the extent accreditation standards developed by the industry after 1985 were not harmful to competition there would be no problem. But were the standards designed simply to keep out alternative forms of marketing there would be justifiable antitrust concerns.

Efforts by an industry to establish performance standards for itself generally are not characterized as per se illegal.[5] Rather, a rule-of-reason analysis is used. Courts will ask whether the restraint is reasonably related to the achievement of an acceptable goal, such as integrating production and distribution, improving information flow, reducing frictions that cause the market to perform poorly, or bringing more transactions into the market. Courts also like objective rules so that competitors are not excluded on a discriminatory basis.[6] Finally, courts focus on whether as a result competition and efficiency are promoted.[7]

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[2] CAB Docket No. 36595, decided December 16, 1982 ("final decision"), at 50.

[3] *Id.*

[4] *Id.* at 51.

[5] Silver v. New York Stock Exchange, 373 U.S. 341 (1963); United States v. Realty Multi-List, 629 F.2d 1351, 1370 (5th Cir. 1978); Eliason Corp. v. National Sanitation Foundation, 614 F.2d 126 (6th Cir. 1980).

In my judgment, the airline industry has nothing to fear from the application of the antitrust laws so long as its accreditation system is reasonably related to fostering an honest and reliable marketing system and does not deny accreditation to innovative retailers.

Some parties to the CAB proceeding argued that exposure to frivolous antitrust litigation would add significantly to the cost of the accreditation system and to the ticket clearinghouse system, leading to their eventual demise. Frivolous litigation is subject to a variety of penalties under the common law, and under newly developing antitrust doctrine there is a marked intolerance by the courts for attempts to use "sham" litigation for anticompetitive ends.[8]

The Federal Trade Commission opposes H.R. 2053, then, because it would unnecessarily restrict innovative forms of marketing, and because it would continue antitrust immunity for an industry that has not convincingly demonstrated why it is necessary. Just as you would not vote to make us all wear navy blue clothing—especially in these hot Washington summers—I hope you will not lock the consumer into the present forms of retailing in the airline industry.

Mr. Chairman and Members of the Subcommittee: that concludes my prepared remarks. I would be pleased to address any questions you might have.

Mr. **MINETA**. Please proceed.

TESTIMONY OF JAMES C. MILLER III, CHAIRMAN, FEDERAL TRADE COMMISSION

Mr. **MILLER**. Thank you, Mr. Chairman. I know you must be tired from all the testimony that has gone forward so far. You will have more after I am here. So I will try to be brief.

I welcome this opportunity to appear before you today to present the views of the Federal Trade Commission. This testimony was endorsed unanimously by the members of the Federal Trade Commission. I am especially delighted to be here because airline regulatory reform has been of continuing interest to me over the years. As you may know, Dr. George Douglas and I wrote a book on airline regulatory matters. As a matter of fact, in 1980 I was employed by the staff of the Civil Aeronautics Board to present testimony in the very proceeding that is the genesis for the bill before you today.

I had a few qualms about possibly testifying before you, but I checked that with our general counsel to make sure that there would be no possible conflict of interest or anything like that. I am here in the capacity of testifying on behalf of the Federal Trade Commission.

The bill at issue would essentially overturn a decision made by the Presidentially appointed members of the Civil Aeronautics Board and accept instead an administrative law judge's opinion. I think what the Board did was in keeping with the spirit of regulatory reform and deregulation of the airlines. It said that those issues affecting the retailing of air transportation should also be deregulated so that in the future, vendors other than travel agents should also have an opportunity to sell airline tickets. That decision would also remove the antitrust immunity that is currently afforded air carriers for the setting up of accreditation systems and also for the clearance of accounts.

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[6] Radiant Burners v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); Eliason, *supra*, at 129.

[7] Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1, 20 (1979).

[8] California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) and progeny.

Now I come back to a basic proposition. When anyone asks for antitrust immunity or wishes to retain antitrust immunity, if such immunity is to be granted a very good argument needs to be made that such immunity would be in the public interest. I do not believe on the basis of what I know about the issues that continuation of antitrust immunity here is defensible. I think the Board was correct in its judgment.

Several portions of the ALJ's decision would be anticompetitive. There are several problems with his decision. For example, the ATC currently requires that travel agencies be freely accessible to the public, which sounds good. But what it means is that in their judgment, if a travel agent is not located in the right kinds of places such as by being located too close to an airline ticket office they can't provide a service.

It would also prohibit travel retailers who might want to concentrate on telephone sales or develop a particular type of passenger clientele. The requirement that they have so-called promotion experience could further restrain competition in that industry.

What you have, then, is a system where only those types of retailers that all airlines agree serve their joint interests are able to sell air travel. The net result is that traditional travel agents are virtually the only marketers of air transportation, other than the airlines. Competition is reduced because the potential for different forms of distribution is eliminated. Individual carriers have little or no incentive to find a superior way to market tickets, and travel agents have only limited incentives to explore new marketing techniques. Consumers are the ultimate losers because of these restraints.

The ALJ did recognize the need for new marketing alternatives. But he foresaw these new alternatives as acting only in a nonagency capacity, perhaps merely dispensing tickets without representing all airlines or giving travel advice. Other parties interpreted his opinion even more narrowly. The International Air Transport Association suggested that such a distributor would have to assume the responsibility for the airline's performance to make it clear that the distributor was not an agent.

The ALJ's decision, then, would allow some alternatives, but would prohibit these new retailers from assisting purchasers by providing fare and route information. In so doing, it would create specific artificial restraints on marketing forms. Acceptance of the ALJ's decision, as this legislation would impose, would entail continual legal controversy over whether a retailer were unlawfully acting as a full-fledged agent or merely dispensing tickets.

Now I want to caveat what I have said by pointing out that I believe there is a great deal of competition among airlines and a great deal of competition among travel agents. Nothing I say today should be taken to the contrary. The problem is that in the retailing area, competition can take only certain forms. The competition that does exist does not take the route that the consumers may most prefer. They certainly don't have the options available that they would have if these restraints were not so limiting.

Mr. Chairman, I understand you mentioned the blue suit example that I have in my written testimony. I think that goes to the point. Of course, I understand the airlines and travel agents both oppose the Board's decision and wish to have the ALJ's decision affirmed. They raised several questions. One thing that they raised is "Well, if you didn't have these rules, consumers would be thrown to the wolves." I don't think that would happen. No one would seriously expect airlines to entrust their ticket stock and their good names to just anyone.

Would the current prohibition mean accredited agencies would die off? No. Everyone agrees that there are efficiencies involved with a system of accredited agents. Such efficiencies would assure the survival of this type service.

But then they say the system can't survive without antitrust immunity. Mr. Chairman, members of the committee, we hear this all the time at the FTC. We heard it last year from the doctors. We heard it this year from the lawyers. Again, I think when anyone asks for an antitrust immunity, the burden of proof has to be on them.

Now I don't think the removal of antitrust immunity would be a problem. To get together to form a system of accreditation for travel agents is not violative of the antitrust laws so long as what they agreed to did not have marked anticompetitive effects. Now you can say "Well, what about private litigants? You and the Federal Government might say you have no problem. The Justice Department has no problem. The FTC has no problem with that. What about private litigants?" Well, I think this probably is the most serious concern one might raise to oppose the Board's decision. This is a troublesome aspect. But let me say this: increasingly the courts have looked with a jaundiced eye at frivolous suits. Affirming the Board's decision would indicate clearly to the courts that it was the will of Congress that frivolous suits be dismissed.

In conclusion, I think the airlines have nothing to fear as long as the accreditation system did not contain anticompetitive features.

Let me conclude that the FTC opposes H.R. 2053 because it would unnecessarily restrict innovative forms of marketing and because it would continue antitrust immunity for an industry that has not convincingly demonstrated why it is necessary. Just as you would not vote to make us all wear navy blue clothing—especially in these hot Washington summers—I hope you will not lock the consumer into the present forms of retailing in the airline industry.

Mr. Chairman and members of the subcommittee, that concludes my prepared remarks. I would be pleased to address any questions you might have.

Mr. MINETA. Thank you. You say on page 5, "accredited agencies." I wonder if you could explain this.

Mr. MILLER. Having accredited agencies means that carriers don't have to go around and check each agent to find out whether they are reputable entrepreneurs and will be responsible with ticket stock and not run away with it or dispense it in a faulty manner. That kind of accreditation works in other industries. Those are the kinds of efficiencies I would expect to result in the continuation of accredited agencies.

Mr. MINETA. Do you have any other examples?

Mr. MILLER. That is the main one, exchange of information among travel agents. There are as you know electronic means of communication that also would result in better economies. I will be glad to get back to you with more specifics if you like.

[See letter, page 64.]

Mr. MINETA. What effects do you think the end of exclusivity would have on the existing travel agents if airlines were free to use agents other than ATC agents? Do you think they will continue to rely extensively on the ATC agents?

Mr. MILLER. Yes, Mr. Chairman, I believe they would. I would anticipate that, ceteris parabus, an economists' term for everything else being equal, accredited travel agents would experience some diminution in business if carriers had an opportunity to go to other types of retailers. Keep in mind that industry has grown by leaps and bounds over the years. A reasonable estimate perhaps 1 year's loss of increase in revenue. I would anticipate, though, that this group would continue to account for the lion's share of nonairline sales.

Mr. MINETA. Your testimony suggests that the antitrust laws do not prohibit an industrywide accreditation system reasonably related to fostering an honest and reliable marketing system. It seems to me there were two main barriers to the willingness of the airlines to modify the current system so that it conforms to the antitrust laws.

First, the airlines will have to be willing to undergo the burden of a discussion and negotiation process in which the current agreement is modified to get rid of conditions which are anticompetitive. Second, the airlines will have to be willing to take the risk that the agreement they finally come up with will be challenged in an antitrust suit.

In view of these difficulties, do you think the airlines will be willing to modify the ATC agreement to conform to the antitrust laws?

Mr. MILLER. Oh, I think by all means they would.

First, there are significant gains to having an accredited system of travel agents. So they would move forward with that. I think that the difficulties of excising the anticompetitive effects from current agreements would be very, very minimal. I think a team of lawyers could sit around at this table and do that in an afternoon, quite frankly.

I can assure you that we at the Federal Trade Commission would be glad to look at any sort of revised agreement and offer comments on it. I am sure that my colleague, Mr. Baxter, would be willing to do so also.

Mr. MINETA. Are you aware of any other independent industries which are subject to the antitrust laws, but are able to maintain a voluntary system of accreditation which resembles the system for accreditation of travel agents?

Mr. MILLER. Well, there are lots of agreements and standards established by different industries, such as production standards. The financial institutions have a great deal of standardization and clearinghouses. There are not to my knowledge specifically the kinds of accreditation travel agents have where you have producers and retailer electively sitting back down at the bargaining table and deciding what the parameters would be.

But I think you have in industry generally enough collective activity of the type that does promote efficiencies, but does not run afoul of the antitrust laws, to suggest that this could happen in the airlines industry.

Mr. MINETA. Does the FTC use administrative law judges?

Mr. MILLER. Yes, sir.

Mr. MINETA. Do you see anything unusual or questionable in an agency reversing an ALJ who presided at an extensive hearing?

Mr. MILLER. Not at all. Very recently the Federal Trade Commission by unanimous vote overturned a decision by an administrative law judge. That was the last decision that we published, the *Grand Union* decision. He is a very fine ALJ, I would add. But we overturned his decision unanimously.

Mr. MINETA. Thank you.

Mr. Hammerschmidt.

Mr. HAMMERSCHMIDT. Mr. Miller, we appreciate your testimony very much. In your testimony you have concluded that adoption of H.R. 2053 would be contrary to the public interest. I know of your long record of professional service in the Government. I know that you served quite a while down at DOT. You know a lot about this industry. I wonder specifically what forms of marketing would you expect to evolve if the CAB decision is allowed to stand.

Mr. MILLER. Well, you know it is difficult to identify the specifics. I would imagine that you would have greater use of the Ticketron-type of ticket dispensing. You would have greater use of banks without the so-called 20-percent rule.

Businesses who have their own business travel departments would engage more in the dispensing of tickets. You may have opportunities for use of electronic equipment and home computers acquiring the information. It is difficult to identify precisely what the industry would look like except to make a judgment at the margin. I would not anticipate wholesale departure from the travel agent industry as we know it today.

Mr. HAMMERSCHMIDT. One of the reasons I ask that is that there is great concern about small business, and the loss of that business where they have five or six agents per agency. And concerns have been expressed that the CAB decision will foster the entrance into the travel agency business of large corporations that will put the travel agencies out of business.

I wonder if you would comment on that concern.

Mr. MILLER. Well, first Congressman, I think if you take the array of travel agencies that you will find the smaller agencies in the less densely populated areas of the country. Those would be the ones that would be practically insulated from the competition that might flow from this bill. So you would find that most likely, the travel agents that would realize the more serious loss of business would be the larger travel agencies located in cities. The small entrepreneur I think would be fairly well protected by the Board's decision.

The bill would not be necessary to protect the small entrepreneurs. But I would expect that business travel departments would pick up some business. Business travel departments already have some business, as you know. The question is whether they would then get paid for doing it and expand their options.

Mr. HAMMERSCHMIDT. As you know, the CAB's administrative law judge found that the collective agreements involving the air carriers and travel agents are, and I quote from his decision, "The glue which holds the nationwide transportation marketing system together," end quote.

Are you convinced beyond any doubt that elimination of these collective agreements will not result in serious disruption to the current distribution system?

Mr. MILLER. I am so convinced.

Mr. HAMMERSCHMIDT. Let me pursue one other idea that you had in your testimony. You stated that under newly developing antitrust doctrine there is a marked intolerance by the courts for attempts to use "sham," in quotes, litigation for anticompetitive ends. I wonder if you would expand on what is contained in this developing doctrine a little bit more for the committee.

Mr. MILLER. Congressman, I would prefer if you would permit me to submit that answer in writing. Not being a lawyer I enter such a task with some caution.

[See letter, page 64.]

Mr. HAMMERSCHMIDT. We would be very pleased to receive that for the record.

I know that you have a pending appointment. So that will be the end of my questions, Mr. Chairman.

Mr. MINETA. Mr. Anderson.

Mr. ANDERSON. Thank you, Mr. Chairman.

Mr. Miller, a moment ago you mentioned that there is a rule in the ATC agreements which prohibit travel agencies from setting up shop too close to an airline ticket office. It is my understanding no such rule exists.

Mr. MILLER. Such a rule did exist when I looked at this matter a couple years ago. But I stand corrected if that is the case.

Mr. ANDERSON. I just checked a moment ago and was told no rule currently exists.

Mr. MILLER. I stand corrected and I am sorry.

Mr. ANDERSON. Dr. Miller, did the Federal Trade Commission participate as a litigant in the CMI when it was before the CAB?

Mr. MILLER. It did not.

Mr. ANDERSON. Was that because the Department of Justice was participating?

Mr. MILLER. I do not know. As I recollect the Department of Justice did participate.

Mr. ANDERSON. But you personally were a witness in the CMI on behalf of the Board's Litigation Bureau, isn't that right?

Mr. MILLER. That is correct.

Mr. ANDERSON. As I understand it, you only participated in the so-called phase VI on pricing issues, and had to withdraw before you were cross-examined on your testimony related to the agency agreements; am I right on that?

Mr. MILLER. I don't think so. I have a copy of the testimony. That was in docket 36595. I could give you the specific information. Of course it had several phases. But I could give you that information.

Mr. ANDERSON. If you would, yes.

[The information received from Mr. Miller follows:]

FEDERAL TRADE COMMISSION,
Washington, D.C., August 5, 1983.

Hon. NORMAN Y. MINETA,
Chairman, Subcommittee on Aviation, Committee on Public Works and Transportation, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for giving me the opportunity to express the views of the Federal Trade Commission on H.R. 2053. At the hearing last week, I was asked to expand upon several statements made in the testimony.

One inquiry related to my assertion that under newly developing antitrust doctrine there is a marked intolerance by the courts for attempts to use "frivolous" litigation for anticompetitive ends. The parlance used in antitrust for this development is the "sham exception to the Noerr-Pennington doctrine." Essentially, the Noerr-Pennington doctrine holds that *bona fide* efforts to influence legislative, executive, judicial or administrative actions are immune from antitrust liability.[1] But when persons use any of these governmental procedures in a "sham" fashion to harass competitors, they lose that immunity.[2] Recent cases that go into some detail discussing the sham exception include *Clipper Express* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 690 f.2d 1240 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 1234 (1983), and *Landmarks Holding Corp.* v. *Bermant*, 644 F.2d 891 (2d Cir. 1981).[3]

I would emphasize that sham litigation can occur with or without the presence of antitrust immunity in a variety of regulatory and commercial settings. In *Clipper*, trucking companies were allegedly filing sham protests through a rate bureau against a price-cutting competitor. As you may know, trucking companies currently have antitrust immunity collectively to fix prices. The immunity does not extend, however, to misusing the rate protest process to file spurious protests. If persons are truly intent on using the legal system to harass competitors, there are many opportunities to do so regardless of whether there is antitrust immunity for one particular activity. Indeed, I would argue that a pervasive system of regulation provides a breeding ground for harassing litigation. If the motor carrier rate regulations in *Clipper* did not exist (and they should not on independent grounds) it would have been more difficult for a person intent on legal harassment to find an excuse to litigate.

A second inquiry related to my previous involvement before the Civil Aeronautics Board in Docket No. 36595, the proceeding which eventually gave rise to H.R. 2053. The International Air Transport Association (IATA) had moved to exclude my testimony because of my appointment by President Reagan as Administrator for Information and Regulatory Affairs, Office of Management and Budget, and Executive Director of the Task Force on Regulatory Reform. IATA argued that this could create the appearance of improper influence over decisions by the Board or Judge. A subsequent order admitted my testimony into Phase 5 of the case for limited purposes. The rather complicated procedural steps relating to admission of my testimony are detailed at pages 14 through 16 of the initial decision in Docket No. 36595.

Finally, I was asked what efficiencies might flow from a common accreditation system that could come into being even after removal of antitrust immunity here. The most obvious efficiency would be minimizing the efforts airlines need to take to assure themselves that they are dealing with reliable agents. Less obvious, but nonetheless important to travel agents, is that multiple appointments would give each agency access to a widespread group of carriers, thereby potentially increasing sales volume at a given outlet. In essence, common accreditation would provide airlines and agents with widespread market presence. The system would also reduce consumer search costs by providing the consumer with at least some assurance (though no guarantee) of reputable travel agents. There is also a possible benefit that would be shared by all parties in having agents skilled in writing up tickets and making proper monetary disbursements.

Let me emphasize that all these benefits that flow from common accreditation can be realized under the terms of the Board's decision. That decision would merely require the removal of anticompetitive restrictions on the forms of marketing that are permissible.

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[1] Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965); see also California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

[2] See, *e.g.*, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. at 515.

[3] Our research indicates that about 200 such cases have been addressed by federal courts within the last 10 years.

If you have any further questions I would be most happy to respond to them. In addition, should your staff be interested in pursuing some of these matters in more detail, please have them contact Andrew J. Strenio, Assistant Director for Regulatory Evaluation, at 523-3275. Again, my thanks for the opportunity you have afforded the FTC to present its views on this important issue.

Sincerely yours,

JAMES C. MILLER III, *Chairman.*

Mr. ANDERSON. Would you agree that the application of the antitrust laws through the courts at the behest of the Department of Justice or private plaintiffs is in essence a kind of regulation of business conduct?

Mr. MILLER. Well, in a sense, yes. As a matter of fact when I was with the Council of Economic Advisers I wrote a chapter in the "Economic Report of the President" that included the subject of antitrust. The chapter was entitled, "Government Regulation." But the important thing I think we need to distinguish here is that the common connotation of the word "regulation" has been the type of economic regulation practiced the Civil Aeronautics Board. That is antithetical to the notion underlying the antitrust laws, which is to rely on competition to prevent abuses of economic monopoly power, and to assure that the forces of competition prevail.

So I see absolutely nothing inconsistent with the notion of applying the antitrust laws and to say that the thrust of doing that would be to deregulate this industry.

Mr. ANDERSON. Following my thought along, is it in essence a kind of regulation of private conduct? You said, in a sense, yes it is. Then the choice we have to make is not really whether to regulate business conduct, but rather, how to regulate it.

Isn't that a fair statement?

Mr. MILLER. Well, that is true. But the whole point is whether you want to regulate in such a way as to prevent competition, or regulate in such a way as to prevent the reduction of competition. The antitrust laws are designed to prevent reductions in competition. The travel agent legislation we are talking about here would prevent an increase in competition.

Mr. ANDERSON. Getting back to this queston of regulation, it is a matter of general principal that you feel the least amount of regulation is the best amount?

Mr. MILLER. It is a very complicated matter, Congressman Anderson.

Mr. ANDERSON. In a sense, yes, then?

Mr. MILLER. Well, to explain adequately would require a long period of time. But if I could just summarize, in the health, safety and environmental areas there is an appropriate amount of regulation. The President's program and the Vice President's Task Force on Regulatory Relief are designed to achieve the optimal amount of regulation in the least costly way.

In the area of transportation the bottom line there is to move away from economic regulation, to eliminate it altogether if possible. That is the anticompetitive type regulation.

Mr. ANDERSON. I am also thinking in terms of having a single finite decision, so that we know that the rules in one part of the country are not different in another part of the country.

Because, if you travel from California to Washington, and there are scattered hodge-podge court decisions all over the country, it is going to disrupt the system. So my feeling is that if the Department of Transportation is right, that these agency programs are very risky business from an antitrust standpoint, even assuming for the purpose of argument that the exclusivity and BTD provisions are removed, then don't we face the prospect that rather than having a single Government agency doing the regulation in this area, that we would have courts and juries all over the country possibly making inconsistent decisions.

Mr. MILLER. I don't think so. I don't think that is a particularly large problem. All other industries that are liable to the antitrust laws face the same potential problem. If they engage in anticompetitive activity, they can well be sued by the Antitrust Division or the Federal Trade Commission, or they might be the subject of private litigation.

So in that sense there is regulation of the anticompetitive activity by the antitrust laws and by private plaintiffs in antitrust suits.

Mr. ANDERSON. Airline travel is a very complicated business. It is not as simple as one might think, particularly in regards to other businesses. It is probably one of the most complicated industries where the buyer must totally rely and trust someone to get what they want, in terms of the cheapest fare, interlining of baggage, et cetera.

It is not as simple as an antitrust suit in some other kind of a business.

Mr. MILLER. Oh, I think that that is not true, Congressman. Picking up on the example that Congressman Hammerschmidt mentioned: in the Grand Union case that we overturned—here we have many, many thousands of grocery stores across our land. How did the produce get there? How did the Wheaties and the other cereals get there? How did the cans of goods get there? They got there through many diverse ways.

Mr. ANDERSON. These are at least business people who have an awareness of how to move in commerce.

Mr. MILLER. That is true.

Mr. ANDERSON. But often the traveler in the airline business is an unsuspecting person who quite possibly has never traveled before. At least someone selling Wheaties knows a little bit about how the system operates.

Mr. MILLER. No, Congressman, what I had in mind was if you and I as consumers go to a grocery store in Stillwater, Okla., or my hometown in Conyers, Ga., or whatever, we have a great deal of trust in the entrepreneur that is running that grocery store. But we don't even think twice whether somebody is doing the job right. The market system works, and it works very, very well. These same individuals are subject to the antitrust laws. And the case that we overturned, that I was talking about before, was an antitrust suit involving a merger of chain supermarkets.

So I think that while there is great diversity across our Nation, and there are many businesses that are quite complicated, some as complicated, I would suspect, as the travel agency business, they work very, very well while still subject to the antitrust laws. The antitrust laws, I repeat, regulate private activity that would prevent or restrain competition. They work very, very well.

Mr. **Anderson**. I hate to have the thought that you would be recommending a system which would be based upon conflicting antitrust suits and decisions all across the country.

Mr. **Miller**. Well, Congressman, if you take that line of argument to its logical conclusion, why not give every industry in America an exemption from the antitrust laws or every industry that has a certain degree of sophistication and complexity an exemption from the antitrust laws?

Mr. **Anderson**. Of course, we are not suggesting this. Buying an airline ticket isn't the same as going into the grocery store and looking on the shelf and saying: "Well, do I want this item?" Our lifestyle doesn't depend upon it as much. But on the other hand when you fly on an airline you are a captive until you reach your destination. It is a frightening experience, particularly for thousands of people who have never flown before.

Mr. **Miller**. Yes.

Mr. **Anderson**. We have the responsibility to make sure that our travel agents are honest and sincere people trying to give the best advice they can. Although we can't be sure all travel agents are well versed and honest, most have a good reputation. If they don't offer the right advice, they will eventually get a bad reputation, and due to free market competition will be dropped from the system.

But I have found travel agents thoughout the country have a good reputation. We change. We get sore at them for different reasons, but by and large we think the travel agents have been doing a good job.

Mr. **Miller**. Oh, I think the industry has done a good job. The question is whether it has reached its full potential. If I could offer another couple of possible examples, I am not sure of this but I understand some small airlines do not enjoy certain antitrust immunities.

Second, you might draw an analogy with rental cars. The rental car industry does not receive antitrust immunity. It provides, though, competition in different parts of the country with its franchise operations. The same thing is true of franchise fast-food operations, again, where consumers can go from one to another realizing that the service you get will meet certain standards and expectations.

So I don't see, Congressman, the kinds of things that I think you and I would agree are important in terms of travel agents—the integrity they have and the perception of the accuracy of their work—as being undermined or compromised by having them be liable to the antitrust laws, like everyone else.

Mr. **Anderson**. You can't see the difference between an airline and a rental car agency or a fast food operation? If you go to rent a car or buy a hamburger and find out that they didn't have what you want, you can simply walk down the street to another rent-a-car-agency or a fast-food establishment.

Mr. **Miller**. You can do that with——

Mr. **Anderson**. You cannot do this with an airline. Renting a car for a day and flying across the country are not in the least bit the same. One must make numerous preparations and commitments when purchasing an airline ticket. And, as I have previously said, you must rely on the competency of a travel agent.

Mr. **Miller**. Well, there is no other perfect substitute for a travel agent. What I was trying to do was give you examples in the transportation area that have certain characteristics similar to the travel agency business. Obviously it is not a direct matching. But sometimes if you travel to another city and you wish to stay in a hotel, and you are going to arrive late, you may put your money down to have reservations. You expect that when you arrive that you will have a room and that you will experience reasonably good service based on your knowledge of the chain or the particular hotel's reputation.

Occasionally you are disappointed. But the same thing is true with the travel agency business. Sometimes you are disappointed. Sometimes they make mistakes, inadvertently, perhaps.

You can have competition among travel agents. I have used travel agents in the past and been displeased with one agency and gone to another travel agency. So there are semblances of competition. There is a great deal of competition among the agencies. But the broad array of opportunities that consumers might most desire is not present.

The reason it is not present is because of exclusivity and antitrust immunity. I believe if these were eliminated, as the Board decided, there would not be significant problems in that industry.

Mr. **Anderson**. I have no further questions, Mr. Chairman. Thank you.

Mr. **Mineta**. Thank you very much, Mr. Anderson.

One of the fears raised here has been that under the Board's decision, there would be a risk of endless litigation over antitrust issues, whether they were valid issues or frivolous.

On page 4 of your testimony you seem to be saying that imposing the ALJ decision also runs the risk of endless litigation, particularly over this rather vague portion of the ALJ decision regarding nonagent marketers. Are you saying that no matter which way we turn, the possibility of increased litigation is a given?

Mr. **Miller**. I think in a way that is true. It is hard at this point to say which would result in the more intensive litigation, but I think invariably there would be litigation flowing from decisions over whether a nontravel agent marketer had stepped over the line.

Mr. **Mineta**. Now, one of the issues on which we have heard conflicting comment is the question of whether or not the existing agency system constitutes a monopoly. Could you comment on that?

Mr. **Miller**. I don't think it is a monopoly in the sense of restraining entry. There has been a large increase in the number of agents. There are certain restrictions on travel agents in terms of background and so forth. Some of those make a great deal of sense. It is not like some professions where it is argued that what they do is once they get aboard they want to roll up the ladder and keep everybody else from getting aboard.

I think the travel agents' organizations in the past have been pretty good in not raising barriers to entry. The point is that they can only compete in certain ways. It is important to consumers that they be allowed to compete in other ways and offer innovative kinds of services and that nonagency retailers be allowed to enter the industry.

Mr. **Mineta**. If I could draw on your "blue suit" analogy which I used earlier, would it be fair to say that the agency system is not a monopoly in the sense that new individuals can and do enter the business, but that it is a monopoly in the sense that once having entered the business, they can only offer certain kinds of services that are already being offered by those already in the business? They cannot compete by offering a genuinely new service. How do you feel about that assessment?

Mr. **Miller**. I think your characterization is correct, Mr. Chairman.

Mr. **Mineta**. Any further questions? Mr. Packard.

Mr. **Packard**. I was going to forego, Mr. Chairman, any questions, because I just arrived. However, I have one question that might throw some light onto the overall deregulation process that you are suggesting.

Recently, there have been more efforts by the airline industry or travel agency industry to accommodate the traveling public than in the past. Why, then, do you recommend further deregulation measures?

Mr. **Miller**. In a crude way of putting it, Congressman Packard, if half an apple is good, a whole apple is even better. While there has been some relaxation, while the ALJ's opinion would allow some movement in the direction of allowing consumers more choices, I don't really see the need to have any restraints imposed on marketing options that consumers might desire.

Mr. **Packard**. Thank you, Mr. Chairman.

Mr. **Mineta**. Well, again, thank you, very much, Mr. Chairman, for your testimony here today and your interest on this whole issue. We appreciate it very much.

Mr. **Miller**. Thank you, sir.

Mr. **Mineta**. I am pleased to call forward at this time the Chairman of the Civil Aeronautics Board, our fine colleague from California, the Hon. Dan McKinnon, who has had a little to do with the subject matter before us today.

Mr. Chairman, we do have your full testimony, and it will be made a part of the record.

[Statement referred to follows:]

PREPARED STATEMENT OF HON. DAN MCKINNON

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I AM PLEASED TO APPEAR HERE TODAY ON BEHALF OF THE CIVIL AERONAUTICS BOARD TO DISCUSS THE BOARD'S DECISION IN THE COMPETITIVE MARKETING INVESTIGATION. THIS IS VERY SPECIAL TESTIMONY AND I WANT TO BE SURE THAT YOU HAVE ALL THE FACTS ON THIS IMPORTANT CASE.

I ASK THAT YOU ACCEPT FOR THE RECORD THE TWO ORDERS THAT THE BOARD ADOPTED IN DECIDING THE MARKETING CASE. THEY PROVIDE A FULL DESCRIPTION OF THE MARKETING SYSTEM, THE ISSUES, AND THE BOARD'S REASONING.

* * *

THE PRINCIPAL FOCUS OF MY TESTIMONY TODAY WILL BE ON SOME OF THE MAIN ARGUMENTS I HAVE HEARD OVER THE PAST SIX MONTHS AGAINST OUR DECISION AND IN SUPPORT OF H.R. 2053, THE AIR TRAVELERS SECURITY ACT.

TO BEGIN, HOWEVER, LET ME OUTLINE THE MAIN ELEMENTS OF THE DECISION:

(1) AN IMPORTANT PART OF OUR DECISION WAS THAT THE BOARD BASICALLY APPROVED COMMON ACCREDITATION AND THE AGENT TICKET SETTLEMENT SYSTEM -- THE AREA SETTLEMENT PLAN.

THESE RULES ESTABLISH CERTAIN LEVELS OF COMPETENCY, HONESTY AND FINANCIAL INTEGRITY, AS WELL AS RULES RELATING TO THE USE OF STANDARD TICKET STOCK, THE HANDLING OF REMITTANCES, TICKET STOCK SECURITY, AND SO FORTH.

(2) WE DECIDED THAT TRAVEL AGENTS SHOULD NOT HAVE AN EXCLUSIVE LICENSE TO SELL AIR TRANSPORTATION.

THE AIRLINES SHOULD NOT BE LIMITED TO ONLY ONE WAY TO SELL THEIR PRODUCT -- THEY OUGHT TO HAVE OTHER MARKETING OPTIONS.

(3) THE BOARD APPROVED THE RULES THAT INHIBIT BUSINESS TRAVEL DEPARTMENTS FROM BECOMING TRAVEL AGENTS BUT LIMITED THAT APPROVAL TO A TWO-YEAR PERIOD.

(4) WE CONCLUDED THAT THE GENERAL RULES OF COMPETITION -- THE ANTITRUST LAWS -- SHOULD GOVERN AIRLINE SALES, RATHER THAN DETAILED GOVERNMENT REGULATION BY THE CAB OR ITS SUCCESSOR; AND

(5) THE BOARD RECOGNIZED THAT THIS WAS A MAJOR CHANGE FROM THE LONG-ESTABLISHED SYSTEM AND WOULD REQUIRE A PERIOD OF ADJUSTMENT, SO IT PROVIDED FOR A TWO-YEAR PERIOD FOR TRANSITION. THIS PERMITS TIME FOR FINE-TUNING THE AGREEMENTS TO MEET ANTITRUST CONCERNS.

WE ALSO SAID THAT WE WOULD REEXAMINE THE ISSUES OF ANTITRUST IMMUNITY BEFORE THE TWO YEARS WERE UP IF IT IS DEMONSTRATED THAT THERE ARE MATERIALLY CHANGED CIRCUMSTANCES, OR IF THERE IS AN IMPORTANT NEED FOR CONTINUATION OF IMMUNITY.

WHILE THESE ARE THE KEY CONCLUSIONS, OUR ACTIONS ARE BASED ON ABOUT 40,000 PAGES OF RECORD EVIDENCE AND TESTIMONY.

FOR EXAMPLE, THE BOARD'S INITIAL OPINION CONTAINS 139 PAGES OF TEXT AND 425 CITATIONS, MOSTLY TO THE HEARING RECORD. WE TOOK A LONG, HARD LOOK AT THE FACTS, THE LAW, AND THE AVIATION POLICY THAT THE CONGRESS ENTRUSTED TO OUR CARE.

WE CONDUCTED THIS REVIEW BECAUSE WE WANTED TO SEE WHETHER THE AIRLINE DISTRIBUTION SYSTEM THAT AROSE UNDER REGULATION WAS COMPATIBLE WITH THE NEW COMPETITIVE ENVIRONMENT.

UNDER THE OLD SYSTEM, ONLY AIRLINES AND THEIR APPOINTED AGENTS COULD SELL TICKETS.

THE AGENTS WERE APPROVED BY ALMOST ALL AIRLINES THROUGH THEIR TRADE ASSOCIATIONS, ATC AND IATA. DETAILED RULES ON WHO COULD BE ACCREDITED AND HOW THEY COULD OPERATE WERE DICTATED BY JOINT AGREEMENT OF THE AIRLINES.

NO AIRLINE COULD PICK ITS OWN AGENTS, OR LET ITS APPOINTED AGENTS DEVIATE FROM THE COMMON RULES, WITHOUT LOSING THE RIGHT TO SELL ITS PRODUCT THROUGH THE COMMONLY ACCREDITED AGENTS.

THE RULES THEMSELVES WERE, AND ARE, DIFFICULT TO CHANGE. NOT ONLY DID MEMBER AIRLINES HAVE TO AGREE, BUT TRAVEL AGENT ORGANIZATIONS ALSO ATTEMPTED TO INFLUENCE THE PROCESS BY MAKING THEIR VIEWS KNOWN ON CHANGES. THE BOARD PROVIDED THE AGREEMENTS SHELTER FROM THE ANTITRUST LAWS SO NO ONE COULD CHALLENGE THEM.

IN A NUTSHELL, REGULATION PRODUCED AN EXCLUSIONARY SYSTEM THAT BOUND ALL AIRLINES TO ONE -- AND ONLY ONE -- WAY OF SELLING THEIR PRODUCT.

AT THE SAME TIME, SALES THROUGH AGENTS WERE AND ARE CRUCIAL TO VIRTUALLY ALL OF THE AIRLINES. ABOUT 60 PERCENT OF DOMESTIC AND 80 PERCENT OF INTERNATIONAL SEATS ARE NOW SOLD BY AGENTS.

SOME PEOPLE SAY THERE IS NO REASON TO CHANGE THE SYSTEM: IT "AIN'T BROKE, SO WHY FIX IT?"

THE BOARD AGREED WITH THAT IN SEVERAL ASPECTS OF THE SYSTEM, I.E., COMMON STANDARDS OF COMPETENCY, HONESTY, AND SECURITY, AND A JOINT SYSTEM OF SETTLING ACCOUNTS BETWEEN AGENTS AND AIRLINES. HOWEVER, THESE ASPECTS WHICH THE BOARD APPROVED ARE ONLY PART OF THE PICTURE.

THERE ARE SUBSTANTIAL PROBLEMS WITH AGREEMENTS THAT UNNECESSARILY RESTRICT COMPETITION.

TICKETRON, FOR EXAMPLE, BELIEVED IT HAD A BETTER IDEA. IT WANTED TO SAVE BOTH AIRLINES AND CONSUMERS MONEY BY SELLING SIMPLE, POINT-TO-POINT

TICKETS THROUGH ITS OUTLETS AT SOME 650-PLUS LOCATIONS THROUGHOUT THE COUNTRY.

AIRLINES COULD NOT USE IT WITHOUT GIVING UP THE BENEFITS OF COMMON AGENTS, BECAUSE OF EXCLUSIVITY AND OTHER RIGID RULES.

AMERICAN EXPRESS DECIDED IT COULD COMPETE BETTER IF IT COULD SET ITS OWN COMPANY STANDARDS FOR MANAGERS AT ITS 125 TRAVEL SALES LOCATIONS THROUGHOUT THE COUNTRY, WHILE STILL MAINTAINING ITS RESPONSIBILITIES TO THE AIRLINES AND THE CONSUMER.

IT COULDN'T ENTER INTO SPECIAL ARRANGEMENTS WITH AIR CARRIERS BECAUSE VARIATIONS ON THE COMMON PERSONNEL STANDARDS WERE NOT PERMITTED.

HOTELS-AUTOS-TOUR-AIR (HATA) WANTED TO BE COMPENSATED FOR BOOKING RESERVATIONS OVER THE TELEPHONE, IN CONJUNCTION WITH THE TRANSLATION SERVICES IT PROVIDED FOREIGN VISITORS. WHEN IT APPROACHED AMERICAN AIRLINES, AMERICAN SAID HATA COULD NOT BE COMPENSATED BECAUSE OF THE EXCLUSIVITY PROVISIONS.

AIRLINE TICKETS BY BANKS (ATBB) FELT THAT AUTOMATIC TICKETING MACHINES FOR SIMPLE TRANSACTIONS, PLACED IN BANKS, WOULD BE PROFITABLE AS WELL AS REDUCE COSTS TO AIRLINES AND CONSUMERS. THIS IDEA ALSO DIDN'T PASS MUSTER UNDER THE STRICT RULES OF THE CONFERENCE AGREEMENTS.

THESE ARE FOUR CONCRETE, INNOVATIVE IDEAS IN THE RECORD BEFORE THE BOARD THAT MIGHT HAVE PROMOTED AIR TRANSPORTATION, INCREASED MARKETING EFFICIENCY, AND SAVED MANY CONSUMERS AND AIRLINES MONEY.

BUT AIRLINES COULD NOT BEGIN TO CONSIDER THEM BECAUSE OF THE CONFERENCE RULES, PARTICULARLY THE EXCLUSIVITY PROVISION.

AND THERE ARE OTHER EXAMPLES OF NEW IDEAS THAT NEVER MADE IT OR WILL NOT MAKE IT BECAUSE OF THE STRICT RESTRICTIONS OF THE COMMON -- AND EXCLUSIVE -- MARKETING SYSTEM. I'LL GET TO THOSE IN A FEW MINUTES.

SOME WITNESSES MAY TELL YOU THAT THE ALJ OPINION WOULD ALLOW COMPETITION.

BUT AFTER CAREFULLY REVIEWING THE TESTIMONY WE COULD ONLY CONCLUDE THAT THE ALJ OPINION EFFECTIVELY RETAINS THE EXCLUSIONARY SYSTEM.

THE CENTERPIECE OF THE DECISION, THE DISTINCTION BETWEEN "MARKETING" AND "AGENCY" EXCLUSIVITY, WAS REJECTED BY ATC, IATA, AND ASTA.

ATC CALLED THE DISTINCTION "A FICTION WITHOUT LEGAL PRECEDENT." (ATC BRIEF TO THE BOARD AT 3-6.) THE TESTIMONY OF LOUIS PERSON FOR IATA WAS THAT ATC EXCLUSIVITY -- WHICH INCLUDES BOTH "AGENCY" AND "MARKETING" PROVISIONS -- AND IATA EXCLUSIVITY -- WHICH ONLY HAS "AGENCY" PROVISIONS -- HAD THE SAME EFFECT. (53 TRANSCRIPT 158.)

THE SIMILAR TESTIMONY OF PAUL BESSEL FOR ASTA IS ATTACHED AS APPENDIX A.

THEREFORE, THERE IS INSUBSTANTIAL EVIDENCE TO SUPPORT THIS FACTUAL FINDING.

FURTHER, THE BOARD CONCLUDED THAT APPLICATION OF LEGAL PRINCIPLES OF AGENCY WOULD, AS A PRACTICAL MATTER, BAR ANY NEW ENTRY.

AT ORAL ARGUMENT, VARIOUS PARTIES HAD VERY DIFFERENT VIEWS OF WHAT THE ALJ OPINION MEANT.

AT BEST, A WHOLE NEW REGULATORY STRUCTURE WOULD HAVE TO BE CREATED TO DETERMINE WHETHER AN AGENCY RELATIONSHIP EXISTED AND, IF SO, WHETHER THE PROPOSED SERVICE WAS "ECONOMICALLY VIABLE" AND THEREFORE DESERVING OF AN EXEMPTION FROM THE ACCREDITATION RULES.

THIS ORIENTATION IS COMPLETELY AT ODDS WITH THE POLICY OF AIRLINE DEREGULATION.

MEANINGFUL COMPETITION EXISTS ONLY WHEN A FIRM CAN ACT WITHOUT FIRST GETTING THE PERMISSION OF ITS COMPETITORS AND THE GOVERNMENT.

SINCE H.R. 2053 WOULD RETAIN ADMINISTRATIVE OVERSIGHT AND SIGNIFICANT REGULATORY BARRIERS TO ENTRY, IT SIMPLY DOES NOT ALLOW TRUE COMPETITION.

AS LONG AS TRAVEL AGENTS ARE PROTECTED FROM MEANINGFUL COMPETITION, THEY WILL BENEFIT AT THE EXPENSE OF AIRLINES AND PASSENGERS.

LET'S LOOK AT THE FACTS.

THE NUMBER OF AGENCIES HAS GROWN AT A PHENOMENAL RATE. SINCE 1971 THEY'VE INCREASED AT AN ANNUAL RATE OF 11 PERCENT PER YEAR. IN 1971 THERE 8,209 TRAVEL AGENCIES. TODAY THERE ARE OVER 20,962. (SEE CHART NO. 1.)

AGENCY ANNUAL DOLLAR VOLUME HAS ALMOST DOUBLED SINCE 1974 WHEN THE BOARD BEGAN REMOVING ANTICOMPETITIVE PROVISIONS ON A PIECEMEAL BASIS.

TRAVEL AGENT SALES REALLY TOOK OFF AFTER DEREGULATION, GOING FROM $19 BILLION IN 1978 TO $31 BILLION IN 1981. (SEE CHART NO. 2.)

AIR CARRIER COMMISSION PAYMENTS HAVE SHOWN AN EVEN MORE DRAMATIC INCREASE OF 167% -- FROM $847 MILLION IN 1977 TO $2.265 BILLION FOR THE 12 MONTHS ENDED JUNE 30, 1982. (SEE CHART NO. 3.)

DESPITE OUR DECISION, THE AMOUNT OF AIR TRANSPORTATION SOLD BY AGENTS CONTINUES TO INCREASE.

FOR THE MONTH OF APRIL 1983, SALES PROCESSED THROUGH THE AREA SETTLEMENT PLAN INCREASED 20% TO $2.2 BILLION, COMPARED TO APRIL 1982.

THE AMOUNT PAID TO TRAVEL AGENTS WAS UP 17% TO $202 MILLION.

THE INCREASE WAS NOT DUE JUST TO THE 9% INCREASE IN THE NUMBER OF AGENTS OVER THE PREVIOUS YEAR.

CHART No. 1

THE EXPLOSIVE GROWTH OF TRAVEL AGENTS

Year End	No. on List	Agency Locations on ATC Agency List and Annual Changes				Net Increase	Net Percentage Increase
		Included in Following Year	Percent Increase	Deleted in Following Year			
1958	2,871	434	15.1	47		387	13.5
1959	3,258	750	23.0	69		681	20.9
1960a/	3,939	577	14.6	109		468	11.9
1961	4,407	437	9.9	141		296	6.7
1962b/	4,703	594	12.6	187		407	8.7
1963	5,110	516	10.1	140		376	7.4
1964	5,486	374*	6.8	230*		144	2.6
1965	5,630*	520	9.2	178		342	6.1
1966	5,972	539	9.0	249		290	4.9
1967	6,262	578	9.2	149		429	6.9
1968	6,691	632	9.4	204		428	6.4
1969	7,119	770	10.8	212		558	7.8
1970	7,677	790	10.3	258		532	6.9
1971	8,209	1,061	12.9	143		918	11.2
1972	9,127	1,272	13.9	193		1,079	11.8
1973	10,206	1,395	13.7	205		1,190	11.7
1974	11,396	1,396	12.2	355		1,041	9.1
1975	12,437	1,582	12.7	358		1,224	9.8
1976	13,661	1,718	12.6	326		1,392	10.2
1977c/	15,053	1,939	12.9	364		1,575	10.5
1978	16,628	1,965	11.8	472		1,493	9.0
1979	18,121	1,602	8.8	375		1,227	9.6
1980d/	17,339	2,248	13.0	384		1,864	10.8
1981	19,203	2,363	12.3	604		1,759	9.2
1982	20,962						

* Number of agents on list, as of Dec. 31, 1965, counted by computer for first time. The additions and deletions processed during 1965 had to be adjusted to reflect a decrease of 152 agency locations from a manual total count of 5,782 in order to coincide with the computed count of 5,630.

a/ "Need" clause eliminated.

b/ Bond requirement instituted.

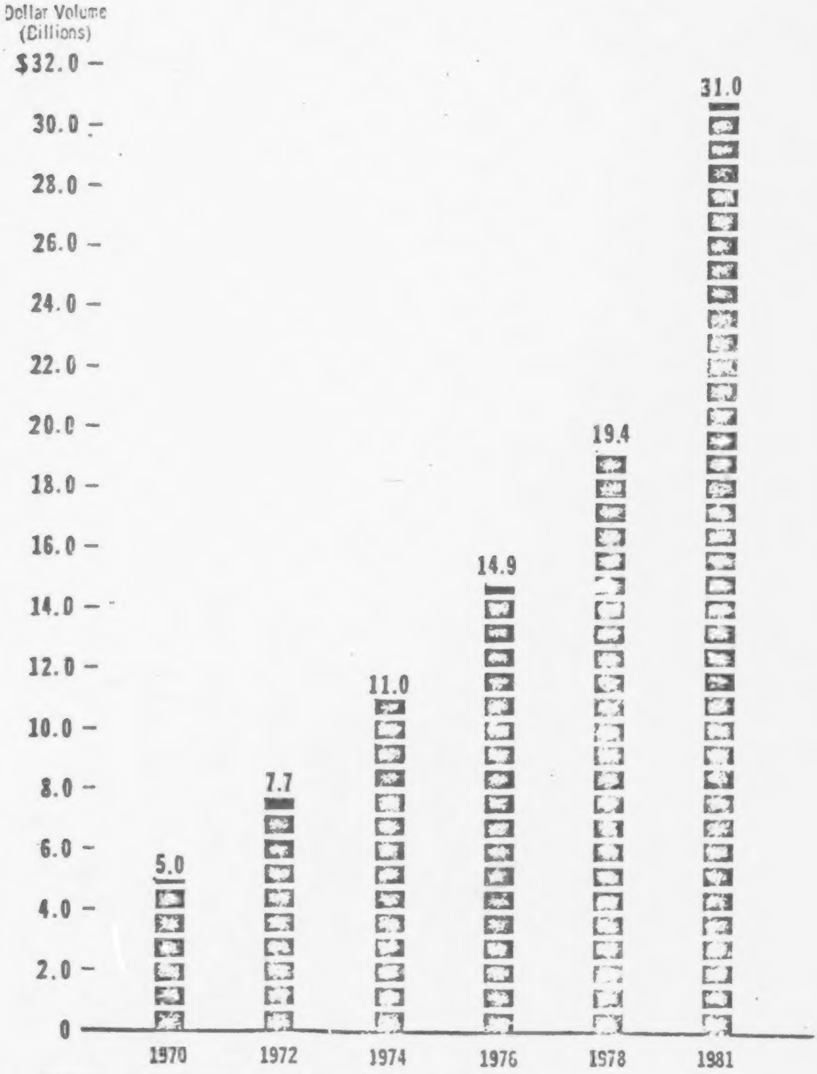
c/ Began 1977 with implementation of travel agent commissioner and discontinuance of agency committee reviews of U.S. agent/applicants.

d/ Effective Oct. 1, 1980, Canada was removed from the ATC program. The figures are based on U.S. agents only.

Source: Travel Weekly's 25th Anniversary Issue
page 80, May 31, 1983.

CHART No. 2.

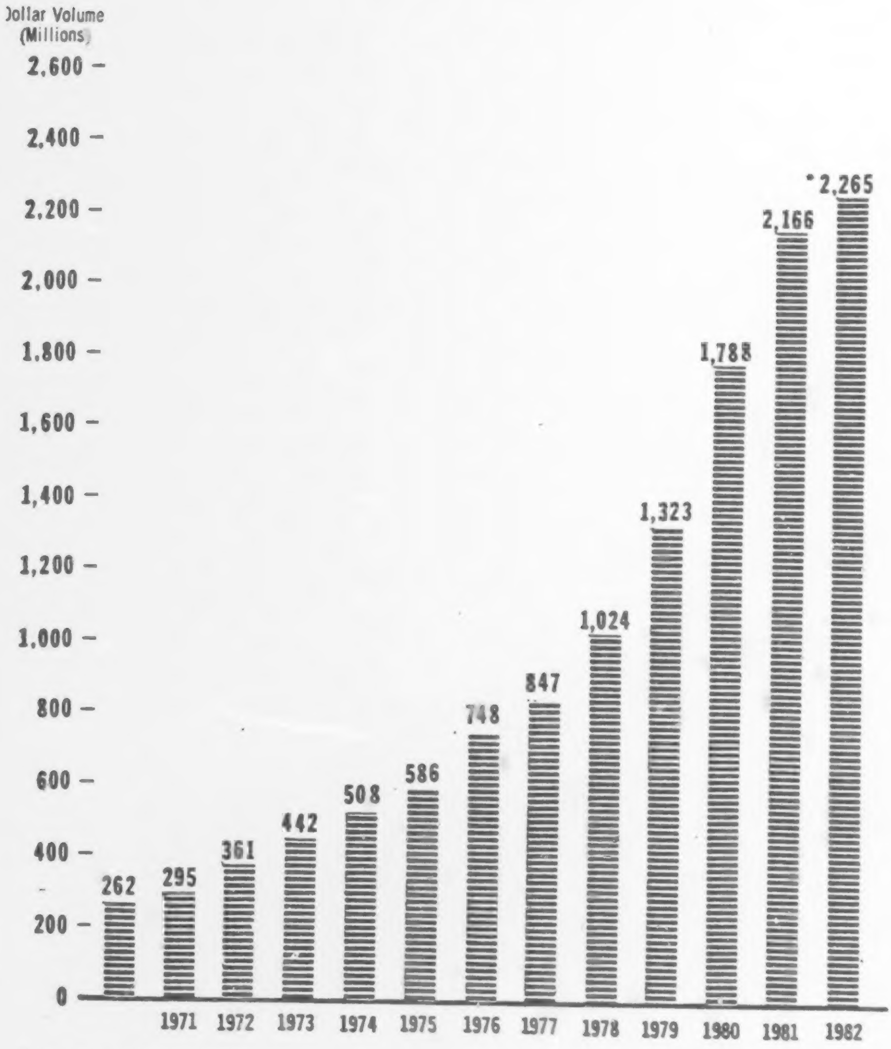
TRAVEL AGENTS HAVE EXPERIENCED
UNPRECEDENTED GROWTH AND PROSPERITY



SOURCE: Travel Weekly's Louis Harris Study May 1982

CHART No. 3.

TOTAL TRAFFIC COMMISSIONS



SOURCE: CAB Form 41 data

*12 Months ended 6/30/82

INDIVIDUAL AGENTS SOLD MORE AIR TRANSPORTATION.

THE AVERAGE WEEKLY SALES REPORT ROSE 15% TO $25,556. (TRAVEL WEEKLY, PAGE 1. MAY 23, 1983.) AND IN JUNE 1983 TRAVEL AGENTS RECORDED SALES OF $2.7 BILLION IN AIRLINE TICKETS. THAT IS GREATER THAN THEIR SALES FOR THE ENTIRE YEAR OF 1970. (AVIATION DAILY JULY 19, 1983.)

HISTORICALLY, AIRLINE PASSENGER MILES AND REVENUES HAVE NOT INCREASED AT ANYWHERE NEAR THE SAME PACE. (SEE CHART NO. 4.)

THE TRAVEL AGENTS WILL PROBABLY TELL YOU THIS IS ALL DUE TO THE GREAT JOB THEY'RE DOING.

THEY ARE RIGHT, WHICH GIVES ME A HARD TIME UNDERSTANDING WHY THEY ARE AFRAID OF COMPETITION.

COMMISSIONS REPRESENT THE FOURTH LARGEST EXPENSE CATEGORY TO AIRLINES, RIGHT BEHIND LABOR, FUEL AND EQUIPMENT COSTS. (SEE CHART NO. 5.)

AIRLINES HAVE DONE MUCH TO MAKE FUEL GO A LONGER WAY.

AND LABOR HAS BEGUN TO SEE THAT IT MUST BE MORE PRODUCTIVE -- AND IN SOME CASES, LESS EXPENSIVE -- IN ORDER FOR THE AIRLINE TO BE COMPETITIVE IN THE MARKETPLACE. THEY DID THIS ONLY IN RESPONSE TO COMPETITIVE PRESSURES.

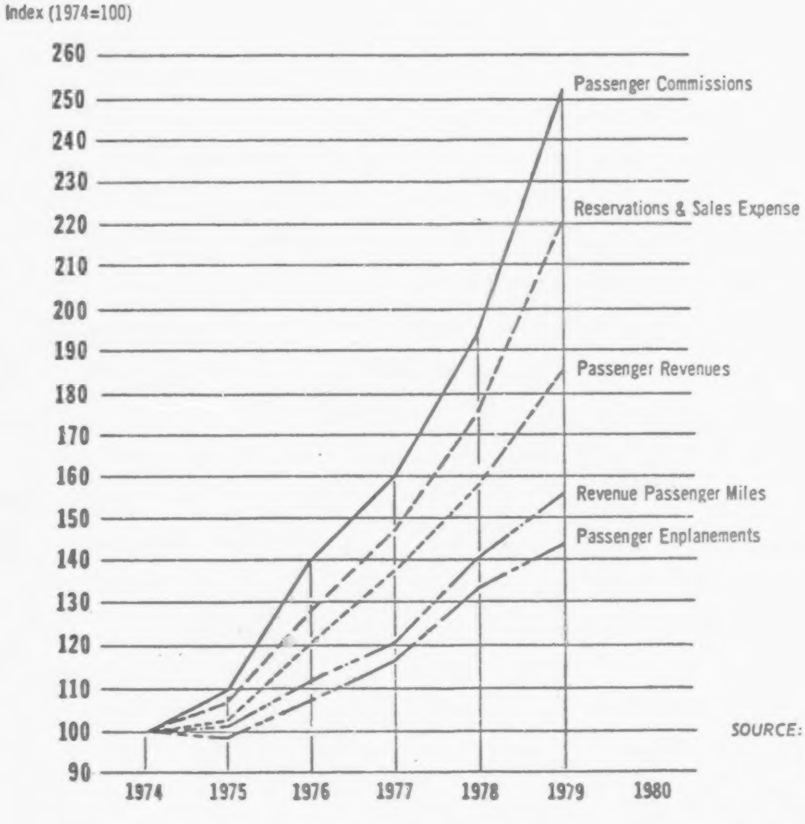
AIRLINES HAVE TRIED TO REDUCE THEIR COMMISSION COSTS AS WELL -- BUT THEY HAVE NOT SUCCEEDED. COMMISSION PAYMENTS HAVE INCREASED FROM $847 MILLION IN 1977 TO $2.265 BILLION FOR THE YEAR ENDED JUNE, 1982. (SEE CHART 2.

WHEN FRONTIER PROPOSED TO LOWER ITS COMMISSION RATE TO NINE PERCENT IN APRIL, 1981, IT GOT ABSOLUTELY NOWHERE.

WHEN UNITED PROPOSED TO DEPART FROM A STRICT COMMISSION BASIS TO A MORE SERVICE-ORIENTED WAY OF FIGURING COMPENSATION FOR AGENTS, IT ALSO GOT NOWHERE.

CHART No. 4.

DOMESTIC TRUNK AND LOCAL SERVICE CARRIERS' PASSENGER COMMISSIONS AND RESERVATIONS & SALES EXPENSES ARE INCREASING MORE RAPIDLY THAN REVENUE AND TRAFFIC



SOURCE: CAB Docket 36595
Exhibit TKTN-101
Page 1 of 1

CHART No. 5.

PRINCIPAL ELEMENTS OF AIRLINE OPERATING EXPENSES
Majors and Nationals

Labor	1972	1981	1982
Total Cost ($millions)	4,627	12,384	12,511
Average Number of Employees	295,684	340,081	319,225
Average Compensation ($)	15,650	36,414	39,193
Percent of Total Operating Expenses	46.8	34.8	35.3

Fuel	1972	1981	1982
Total Cost ($millions)	1,189	10,461	9,674
Gallons Used (millions)	10,195	10,041	9,834
Avg. Cost Per Gal. (¢)	11.7	104.2	98.4
Percent of Total Operating Expenses	12.0	30.4	28.1

Traffic Commissions	1972	1981	1982
Total Cost ($millions)	342	2,063	2,214
RPM's (billions)	164	251	261
Cost Per RPM (¢)	0.209	0.821	0.850
Percent of Total Operating Expenses	3.5	5.8	6.2

Passenger Meals	1972	1981	1982
Total Cost ($millions)	390	993	1,015
RPM's (billions)	164	251	261
Cost Per RPM (¢)	0.230	0.395	0.390
Percent of Total Operating Expenses	3.9	2.8	2.9

Landing Fees	1972	1981	1982
Total Cost ($millions)	257	585	593
Aircraft Capacity Tons Landed (millions)	98	106	106
Cost Per Ton Landed ($)	2.63	5.50	5.60
Percent of Total Operating Expenses	2.6	1.6	1.7

Advertising & Promotion	1972	1981	1982
Total Cost ($millions)	254	623	731
RTM's (millions)	22,782	32,536	33,308
Percent of Total Operating Expenses	2.6	1.8	2.1

Total Operating Expenses	1972	1981	1982
($millions)	9,885	35,583	35,468

Interest	1972	1981	1982
Interest on Debt ($millions)	344	1,292	1,431
Average Debt Outstanding ($millions)	5,950	12,325	13,584
Average Book Interest Rate (%)	5.8	10.5	10.5
Percent of Total Operating Expenses	3.5	3.6	4.0

Maintenance Materials and Other Costs	1972	1981	1982
Total Costs ($millions)	2,482	6,870	7,083
Percent of Total Operating Expenses	25.1	19.3	20.0

Total operating expense includes interest on debt less depreciation and amortization.
AIA Chart

THE SHORT OF THE MATTER IS THAT NO MAJOR AIRLINE, ACTING ALONE, CAN AFFORD TO OFFER LOWER COMMISSION RATES THAN OTHERS, BECAUSE THEY DEPEND ON AGENT SALES SO MUCH. AS A CONSEQUENCE, THEY CAN COMPETE ONLY IN LIMITED WAYS. COSTS TO CONSUMERS INCREASE AS A RESULT.

EVERYONE PAYS FOR THE AIRLINES' MARKETING COSTS IN THE PRICE OF THE TICKET. BETWEEN 1978 AND 1982, TRAFFIC COMMISSIONS AS A PERCENTAGE OF TOTAL OPERATING REVENUE HAVE RISEN BY 38%.

AND UNLIKE THE TRENDS IN FUEL AND WAGES, THE COST TREND HERE IS CLEARLY CONTINUING TO INCREASE. (SEE CHARTS 5 AND 6.) THAT'S BECAUSE THERE IS NO COMPETITIVE SPUR TO CONTROL MARKETING COSTS.

IN CONTRAST, COMPETITIVE PRESSURES HAVE FORCED AIRLINES TO CONTROL FUEL CONSUMPTION AND TO BARGAIN HARD FOR WAGE AND PRODUCTIVITY IMPROVEMENTS. INDEED, IT CAN BE ARGUED THAT PRESSURE ON LABOR FOR WAGE AND PRICE CONCESSIONS IS GREATER AS LONG AS COMMISSION COSTS REMAIN OUT OF CONTROL.

AIRLINES WILL NOT HAVE THE FREEDOM TO USE UNTOLD INNOVATIONS IF THE BOARD'S DECISION IS REVERSED. FOR EXAMPLE, CONSIDER

-- DIRECT SALES THROUGH COMPUTERS IN BUSINESS OR HOMES, WHERE THE MARKETER IS COMPENSATED FOR TAKING THE RESERVATION.

-- TICKETING MACHINES PLACED BY AGENTS IN REMOTE LOCATIONS;

-- SALES OUTLETS THAT ARE OPEN ONLY ON WEEKENDS OR IN THE EVENINGS; AND

-- SALES OUTLETS THAT ONLY DO BUSINESS OVER THE TELEPHONE.

CHART No.6.

TRAFFIC COMMISSIONS AND OPERATING REVENUE
TOTAL CERTIFICATED INDUSTRY
($ MILLIONS)

Calendar Year	Operating Revenue ($ Millions)	Total Traffic Commissions ($ Millions)	Traffic Commissions As A Percent of Operating Revenue
1970	9,289.7	262.0	2.8
1971	10,045.6	294.9	2.9
1972	11,163.3	360.9	3.2
1973	12,418.8	442.1	3.4
1974	14,703.2	508.6	3.5
1975	15,356.3	586.2	3.8
1976	17,505.6	745.7	4.3
1977	19,926.4	847.9	4.3
1978	22,892.1	1,024.5	4.5
1979	27,227.0	1,322.9	4.9
1980	33,727.8	1,788.0	5.3
1981	36,502.2	2,166.3	5.9
1982*	36,235.0	2,264.6	6.2

* 12 months ended 6/30/82.

Source: CAB Form
41 data

THESE ARE LOST OPPORTUNITIES. THEY MAY NEVER WORK, OR THEY COULD WORK WELL.

BUT THEY HAVE BEEN JUDGED INADEQUATE BY COMPETITORS, NOT CONSUMERS.

WHAT I HAVE TOLD YOU UP TO NOW IS NOT THEORY OR PHILOSOPHY -- IT IS FACT. THE REASONABLE CONCLUSION TO DRAW FROM THESE FACTS IS THAT INDIVIDUAL AIRLINE INNOVATION IS SEVERELY STIFLED BECAUSE OF AN EXCLUSIVE SYSTEM OF MARKETING. NEW IDEAS SIMPLY DO NOT HAVE AN OPPORTUNITY TO TAKE ROOT.

MARKETING IS REDUCED TO THE LOWEST COMMON DENOMINATOR -- ONLY IF EVERY AIRLINE AND MOST AGENTS AGREE THAT A NEW WAY OF DOING BUSINESS IS GOOD, WILL IT GET A CHANCE TO BE TESTED IN THE MARKETPLACE.

SINCE NEITHER AIRLINES NOR AGENTS, AS A GROUP, HAVE MUCH INCENTIVE TO EMBRACE NEW IDEAS, INNOVATION WILL NECESSARILY COME SLOWLY, IF AT ALL.

IN THIS DAY OF RAPID CHANGE TO A DEREGULATED AIR TRANSPORT SYSTEM, A STATIC MARKETING STRUCTURE IS SIMPLY NOT PRACTICAL.

CHANGE, WHICH PRODUCES MORE EFFICIENT WAYS OF DOING BUSINESS, IS DIFFICULT TO ACCEPT, BUT THAT IS THE ESSENCE OF COMPETITION.

THE LACK OF COMPETITIVE INNOVATION HURTS THE AIRLINE INDUSTRY BECAUSE NO MAJOR AIRLINE CAN TRY BETTER WAYS TO SELL ITS PRODUCT IN RESPONSE TO THE DEMANDS OF THE DEREGULATED MARKETPLACE.

NO AIRLINE SHOULD NOW BE LEGISLATED INTO A MARKETING STRAIGHT JACKET, WHEN THE FORMER REGULATED SYSTEM MAY NOT SOLVE ITS NEEDS IN THE PRESENT OR FUTURE COMPETITIVE ENVIRONMENT.

AT THE RISK OF SIMPLIFYING TOO MUCH, THE BOARD LOOKED AT THE RESTRICTIONS ON COMPETITION AND ASKED WHY THEY WERE NECESSARY. WHAT PUBLIC INTEREST DID THEY SERVE?

THE ANSWER, IN SHORT, IS NONE. THE FACTS SHOWED THAT EXCLUDING EVERYONE BUT ATC/IATA AGENTS FROM MARKETING SERVED NO LEGITIMATE PURPOSE. IT ONLY PROTECTED THOSE WHO AGREED TO DO BUSINESS IN ONE CERTAIN WAY: THE AGENTS, AND THOSE AIRLINES THAT DID NOT WANT TO COMPETE IN MARKETING.

AN EXCLUSIVE LICENSE FOR TRAVEL AGENTS IS NOT NEEDED FOR THE EFFICIENT DISTRIBUTION OF AIRLINE SERVICES: IT DOES NOT INCREASE PRODUCTIVITY, OR LOWER COSTS. THIS IS FACT, NOT THEORY.

THE ECONOMIC INCENTIVE FOR THE AIRLINES TO CONTINUE THE TRAVEL AGENT PROGRAM IS PROVIDED BY THE AREA SETTLEMENT PLAN AND CERTAIN BASIC COMMON ACCREDITATION STANDARDS. IT IS AN EFFICIENT, COST-SAVING WAY TO ESTABLISH A WIDESPREAD, COMPETENT, AND SECURE DISTRIBUTION SYSTEM -- BUT NOT NECESSARILY THE ONLY ONE THAT COULD BE DEVISED.

EXCLUSIVITY CONTRIBUTES NOTHING TO THESE LEGITIMATE OBJECTIVES.

A NUMBER OF AIRLINES INITIALLY OPPOSED DEREGULATION BECAUSE SOME PREDICTED CHAOS AND ECONOMIC DOOM AT THE HANDS OF THE LARGE CARRIERS. BUT THEY NOW APPRECIATE THE FREEDOM THAT THE BOARD AND CONGRESS GAVE THEM TO COMPETE.

THEY ALMOST UNIVERSALLY FAVOR DEREGULATION TODAY EVEN THOUGH TIMES HAVE BEEN TOUGH FOR THE AIRLINES.

INDEED, MANY FEEL THAT THEY COULD NOT HAVE SURVIVED THE RECESSION WITHOUT THE FREEDOM THAT DEREGULATION HAS GIVEN THEM.

AND IT SEEMED ONLY FAIR TO ME, AS WE TURNED EACH AIRLINE LOOSE TO SURVIVE OR FAIL BASED ON ITS MANAGEMENT TALENTS, THAT THEY CERTAINLY NEEDED TO HAVE CONTROL OVER ALL OF THEIR OPERATIONS, INCLUDING THE SALE AND MARKETING OF THEIR OWN TICKETS.

IN 1978 THE CONGRESS PASSED THE AIRLINE DEREGULATION ACT. CONGRESS TOLD THE CAB, IN NO UNCERTAIN TERMS, TO PLACE RELIANCE ON COMPETITION AND MARKET FORCES TO THE GREATEST EXTENT REASONABLY POSSIBLE. ANTICOMPETITIVE AGREEMENTS ARE FAR MORE DIFFICULT TO JUSTIFY UNDER THE ACT. ALSO, ANTITRUST IMMUNITY NO LONGER FOLLOWS AUTOMATICALLY FROM BOARD APPROVAL.

THE BOARD HAS COMPLIED WITH THE LAW BY SEEKING TO REDUCE THE ANTICOMPETITIVE ASPECTS OF THE AIRLINE TRAVEL AGENT AGREEMENTS.

FOR EXAMPLE, IN 1979 WE DISAPPROVED THAT PART OF THE AGREEMENTS THAT ALLOWED THE AIRLINES TO SET UNIFORM COMMISSION RATES, IN OTHER WORDS, TO FIX THE PRICES THEY PAID THEIR AGENTS. THE BASE COMMISSION RATE HAS RISEN SINCE THEN BY 42 PERCENT, FROM 7 PERCENT TO AN AVERAGE OF 10 PERCENT.

THERE ARE OTHER EXAMPLES WHERE THE BOARD APPLIED THE PRINCIPLES OF THE DEREGULATION ACT -- EVEN BEFORE THAT LAW WAS PASSED -- TO REDRESS THE COMPETITIVE STRUCTURE OF MARKETING.

THE BOARD WAS CONCERNED ABOUT THE AIRLINES ABUSING THEIR ECONOMIC POWER, ESPECIALLY IN VIEW OF THE PROTECTION FROM ANTITRUST CHALLENGE THAT THEY RECEIVED BECAUSE OF ANTITRUST IMMUNITY. AIRLINE COOPERATIVE DECISIONMAKING WAS USED TO CARVE OUT MARKETS THAT WOULD ONLY BE SERVED BY THE AIRLINES.

THE ORIGINAL TRAVEL AGENT AGREEMENTS WERE NOT COMPREHENSIVE AND ALLOWED SUBSTANTIAL CARRIER DISCRETION. THERE WERE NO EXCLUSIVITY RULES.

OVER TIME, HOWEVER, THE AIRLINES GREATLY EXPANDED THEIR SCOPE AND THE BOARD'S REGULATORY ROLE INCREASED CONCOMITANTLY. AIRLINES ATTEMPTED TO RELEGATE TRAVEL AGENTS TO THE ROLE OF "PROMOTERS" OF AIR TRANSPORTATION AMONG DISCRETIONARY TRAVELERS WHILE THE AIRLINES ATTEMPTED TO RETAIN "NON-DISCRETIONARY TRAVELERS" WHO NEEDED ONLY SIMPLE TICKET SERVICES.

IN THE RECENT PAST, THE BOARD MADE MANY DECISIONS -- JUSTIFIED BY THE NEED TO PROMOTE COMPETITION -- THAT HAVE HELP AGENTS. (SEE APPENDIX B.)

THE AGENTS HAVE MADE THE MOST OF THEIR COMPETITIVE FREEDOMS. FOR EXAMPLE, CORPORATE TRAVEL NOW IS THE FASTEST-GROWING PART OF TRAVEL AGENTS' BUSINESS. INDEED, IT NOW REPRESENTS 54 PERCENT OF AGENCY BOOKINGS COMPARED TO ABOUT 43 PERCENT JUST A FEW YEARS AGO. (SEE CHART NO. 7.)

THE *CMI* DECISION IS ONLY THE LATEST OF A CONSISTENT LINE OF BOARD ACTIONS FAVORING COMPETITION.

THERE ARE A FEW POINTS THAT SHOULD BE MADE:

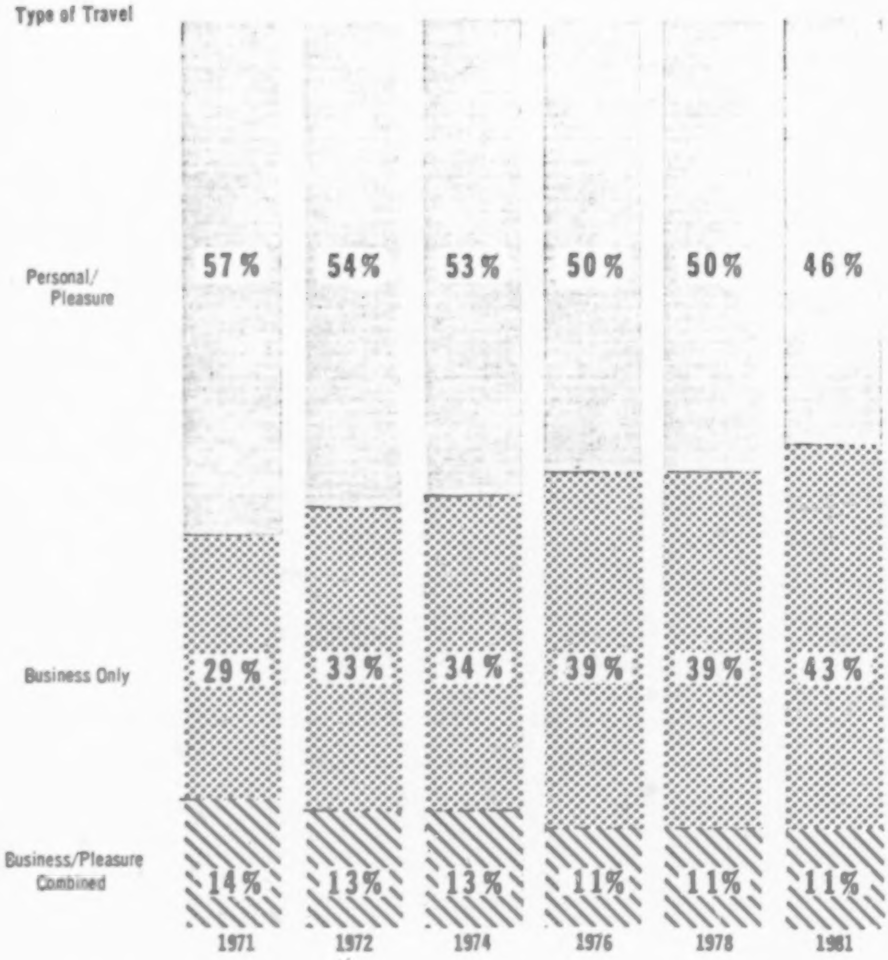
(1) OVERALL, THE BOARD HAS BEEN EVENHANDED IN EXERCISING ITS MANDATE. ITS DECISIONS HAVE BEEN PHILOSOPHICALLY CONSISTENT, NOT AN ATTEMPT TO FAVOR AGENTS OR AIRLINES. THE AGENTS COMPLAIN NOW, BUT THEY HAVE CHEERED DEREGULATION AT OTHER TIMES. INDEED, CERTAIN AGENT GROUPS ARE RIGHT NOW URGING US TO DISAPPROVE OR DENY ANTITRUST IMMUNITY TO SCHEDULED AIRLINE TRAVEL OFFICE (SATO) AGREEMENTS.

(2) THE BOARD'S DECISIONS HAVE BEEN BASED ON A CAREFUL LOOK AT THE FACTS. ANYONE WHO ARGUES TO THE CONTRARY HASN'T READ OUR DECISION, OR DOESN'T UNDERSTAND IT, OR CHOOSES NOT TO UNDERSTAND. TO BE SURE, THE BOARD IS DISPOSED TO FAVOR COMPETITION AND DEREGULATION, AS CONGRESS TOLD US TO DO. BUT OUR DECISIONS ARE FIRMLY GROUNDED ON THE FACTS.

(3) IF H.R. 2053 HAD BEEN IN EFFECT, I DOUBT WHETHER ANY OF THESE DECISIONS WOULD HAVE BEEN MADE. THE BILL SAYS THAT AIR CARRIER COOPERATIVE AGREEMENTS ENJOY A STRONG PRESUMPTION OF VALIDITY. THAT WILL BE VERY DIFFICULT TO OVERCOME.

CHART No.7.

BUSINESS TRAVEL IS AN INCREASINGLY IMPORTANT PART OF AGENT'S SALES



SOURCE: Travel Weekly's Louis Harris Study May 1982

* * *

WILL THE BOARD'S DECISION DESTROY THE AIRLINE DISTRIBUTION SYSTEM? IN SHORT, "NO".

IF CHANGES HAPPEN, THEY WILL BE IN RESPONSE TO THE DEMANDS OF THE MARKETPLACE. THE BOARD DID NOT FORCE CHANGE -- IT SIMPLY REMOVED OBSTACLES TO LEGITIMATE FORMS OF COMPETITION.

IF THE PRESENT TRAVEL AGENCY SYSTEM IS EFFICIENT, ECONOMIC AND FULLY SATISFIES CONSUMER DEMANDS, THERE WILL BE NO MAJOR CHANGES. AND IF AN AGENT IS GOOD AT WHAT HE OR SHE DOES, THE AGENT DOESN'T HAVE TO FEAR COMPETITION. THE AGENT WILL PROSPER UNDER THE FREE ENTERPRISE SYSTEM.

BUT IT IS ALSO LIKELY THAT A GREATER VARIETY OF DISTRIBUTION TECHNIQUES WITH VARYING COSTS WILL EMERGE TO SERVE SPECIALIZED CONSUMER DEMANDS. WE HAVE ALREADY SEEN THIS OCCUR AMONG THE AIRLINES. CONSIDER FOR EXAMPLE, PEOPLE EXPRESS AND AIR ONE, AT OPPOSITE ENDS OF THE SERVICE OPTIONS SPECTRUM.

THE ESSENTIAL POINT IS THAT COMPETITION IS A BETTER WAY OF DETERMINING WHAT IS BEST FOR AIRLINES AND THEIR PASSENGERS.

THE IDEA THAT THE GOVERNMENT SHOULD BE DEVISING AND SUPERVISING A UNIFORM, INFLEXIBLE, INDUSTRY-WIDE DISTRIBUTION SYSTEM BELONGS TO THE DAYS OF PERVASIVE FEDERAL REGULATION OF ALL ASPECTS OF AIR CARRIER BEHAVIOR.

H.R. 2053 IS BEING TOUTED AS A CONSUMER PROTECTION BILL. SOME PEOPLE ARGUE THAT AIRLINES WILL TEND TO APPOINT INCOMPETENT AGENTS AND THE CONSUMER WILL SUFFER AS A RESULT.

THE EFFECT OF H.R. 2053 WILL NOT BE TO PROTECT CONSUMERS, BUT TO PROTECT TRAVEL AGENTS FROM COMPETITION, AT THE EXPENSE OF CONSUMERS.

THE ADVOCATES OF H.R. 2053 WOULD HAVE YOU BELIEVE THAT WE DISREGARDED THE INTERESTS OF CONSUMERS.

THAT DOESN'T SQUARE WITH THE FACTS.

THE BOARD HAS RETAINED CONSUMER PROTECTION REGULATIONS LIKE DENIED BOARDING COMPENSATION, BAGGAGE LIABILITY, AND NO-SMOKING RULES WHEN IT IS CONVINCED THAT THE MARKETPLACE PROVIDES INSUFFICIENT INCENTIVES TO PROTECT PASSENGERS IN THEIR DEALINGS WITH AIRLINES. WE TAKE A HARD LOOK AT THE FACTS BEFORE WE ACT.

IN THE CMI, WE CAREFULLY ANALYZED THE CLAIM THAT COMPETENCE AND HONESTY WILL SUFFER. BUT AIRLINES HAVE ABSOLUTELY NO INTEREST IN TURNING THEIR RETAIL OPERATIONS OVER TO PEOPLE WHO ARE INCOMPETENT OR DISHONEST. TAKE A LOOK FROM THE AIRLINE'S PERSPECTIVE:

-- THE AIRLINE MUST PROVIDE THE TRANSPORTATION, OR A REFUND. UNDER LAW, THE AIRLINE MUST TAKE RESPONSIBILITY FOR THE ACTIONS OF PERSONS IT HAS ALLOWED TO SELL ITS TICKETS. THE CONSUMER ALWAYS HAS RECOURSE TO THE AIRLINE FOR A REFUND.

-- IT MUST FINANCIALLY BACK UP EACH OF ITS TICKETS THAT IS WRITTEN FOR TRANSPORTATION OVER ANOTHER AIRLINE.

-- THE AIRLINE BEARS THE COST OF ANY ILL WILL GENERATED FROM IMPROPER TICKETING.

-- THE AIRLINE WANTS TO SATISFY ITS CUSTOMERS.

-- TICKET STOCK IS LIKE A BLANK CHECK ON THE AIRLINE'S ACCOUNT, SO SECURITY AND TRUSTWORTHINESS WILL ALWAYS BE A HIGH PRIORITY. IT IS NOT REALISTIC TO CLAIM THAT GAS STATIONS OR GROCERS WILL BE GIVEN TICKET STOCK.

IF YOU WISH TO INSURE TICKETING COMPETENCE, IT WOULD REQUIRE MORE STRINGENT LICENSING TO ACHIEVE IT.

NOTABLY, HOWEVER, IT WAS TRAVEL AGENT OPPOSITION THAT IN LARGE MEASURE LED ATC TO WITHDRAW A RULE THAT WOULD HAVE TESTED AGENTS' TICKETING SKILLS.

H.R. 2053 DOES NOT INSURE COMPETENCE, HONESTY, OR FINANCIAL INTEGRITY.

* * *

RATHER THAN FOCUS ON THE OPPORTUNITIES PRESENTED BY COMPETITION, SOME AGENTS FEAR THE LOSS OF BUSINESS IF OTHER MARKETING ALTERNATIVES ARE PERMITTED.

THIS FEAR IS GREATLY EXAGGERATED.

ONE OF THE AGENT'S OWN WITNESSES TESTIFIED THAT TRAVEL AGENTS WOULD LOSE ONLY 2 PERCENT OF THEIR SALES IF THEIR EXCLUSIVE PRIVILEGE IS LOST.

ASTA NOW CHALLENGES THE TESTIMONY OF ITS OWN WITNESS AT THE HEARING AS UNRELIABLE. IN A RECENT LETTER TO THE SMALL BUSINESS COMMITTEE IT SAYS ITS ASSUMPTIONS WERE OPTIMISTIC AND UNREALISTIC. BUT IT'S A LITTLE LATE TO ATTEMPT TO DISCREDIT YOUR OWN WITNESSES.

IN THAT SAME LETTER THEY REVISE UPWARD THE AMOUNT OF BUSINESS AGENTS WILL LOSE. NOW THEY SAY IT WILL BE $700 MILLION IN SALES OR $70 MILLION IN AGENT REVENUE. THE NEW FIGURE IS 2.2% OF 1981 TOTAL SALES, WHICH INCLUDES

TOURS, HOTELS, CAR RENTALS, BESIDES AIRLINE SALES. IT IS 3.2% OF 1982 SALES THROUGH THE AREA SETTLEMENT PLAN AND 3.4% OF 1981 AGENT COMMISSIONS. WHEN AGENTS SAY THEY WILL LOSE $70 MILLION IN COMMISSIONS BECAUSE OF OUR DECISION, REMEMBER THAT COMMISSION PAYMENTS TO AGENTS INCREASED BY $151 MILLION IN 1982. THAT FIGURE IS ONLY FOR THE SO-CALLED NATIONAL OR MAJOR CARRIERS. IT DOESN'T INCLUDE FOREIGN CARRIERS OR NEW ENTRANTS OR COMMUTER CARRIERS. (SEE CHART NO. 4.) OUR DECISION WILL MERELY SLOW THE RATE OF AGENCY GROWTH, NOT DEPRIVE AGENTS OF REVENUE, EVEN IF THESE NEW, UNTESTED FIGURES ARE ACCEPTED.

OUR CONCLUSION, THEREFORE, REMAINS UNCHANGED. THE AGENCY SYSTEM WILL NOT SUFFER SEVERE ECONOMIC HARM BECAUSE OF OUR DECISION.

* * *

ANOTHER ARGUMENT YOU WILL NO DOUBT HEAR IS THAT THE INTEGRATED AIR TRANSPORTATION SYSTEM, WHICH PERMITS INTERLINE TICKETS AND INTERCONNECTION OF BAGGAGE, WILL BE HARMED.

THIS IS NOT A NEW ARGUMENT. IT IS PERHAPS THE MOST OVERWORKED THEME FROM THE SKY-IS-FALLING SCHOOL OF ADVOCACY.

THE BOARD HAS HEARD, EVERY TIME IT PROPOSES A CHANGE, THE ALL TOO FAMILIAR REFRAIN THAT TICKET-REFUNDABILITY AND INTERLINING OF TICKETS AND BAGGAGE WILL COLLAPSE.

THE ARGUMENT WAS HEARD WHEN THE BOARD PROPOSED DISAPPROVING FIXED COMMISSIONS (1978-79), ENDING MANDATORY JOINT FARES (1980-81), ADOPTING THE MAXIMUM TARIFF RULE (1981), AND BEFORE THE STATUTORY ELIMINATION OF

DOMESTIC TARIFFS (1982) TO NAME A FEW INSTANCES. THE PROPOSED CHANGES ALL CAME TO PASS. DESPITE PREDICTIONS OF DISASTER, INTERLINING CONTINUES UNABATED.

THERE SIMPLY IS NO EVIDENCE OR EXPERIENCE TO SUPPORT THE COMPETITIVE MADNESS THEORY. THE EVIDENCE ALL GOES THE OTHER WAY.

THE ECONOMIC REALITY IS THAT AIRLINES INTERLINE BECAUSE THEY USUALLY MAKE MORE MONEY THAT WAY, BY ATTRACTING ADDITIONAL TRAFFIC.

AIRLINES HAVE EVERY REASON TO CONTINUE INTERLINING.

FOR EXAMPLE, A CARRIER THAT GOES FROM POINT A TO POINT C WILL OBVIOUSLY TRY TO GET A PASSENGER FOR THE WHOLE JOURNEY. BUT A CARRIER THAT ONLY GOES FROM A TO B IS GOING TO INTERLINE WITH A CARRIER THAT GOES FROM B TO C. THE CARRIER WILL WANT TO GET HALF OF THE SLICE OF PIE RATHER THAN GETTING NOTHING.

EVEN THE LARGEST CARRIERS SERVE ONLY FRACTIONS OF ALL POSSIBLE CITY-PAIR MARKETS, SO CARRIERS WILL CONTINUE TO INTERLINE. JOHN ZEEMAN OF UNITED AIRLINES RECENTLY CAME TO THE SAME CONCLUSION.

SECOND, INTERLINING IS CONTROLLED BY ENTIRELY DISTINCT AGREEMENTS THAT WERE NOT EVEN IN ISSUE IN THE MARKETING CASE. THE BILL'S SUPPORTERS AND INDEED THE BOARD ITSELF BELIEVE THAT THESE AGREEMENTS DO PROVIDE SUBSTANTIAL BENEFITS TO TRAVELERS. SO IT IS THEREFORE INSTRUCTIVE TO ANALYZE WHAT THEY SAY AND WHAT THEY DON'T SAY.

THE AGREEMENTS ARE SOLELY AMONG AIRLINES; THEY DEAL WITH SETTLEMENT PROCEDURES. THE SIGNATORY AIRLINE AGREES TO BE FINANCIALLY LIABLE FOR ANY TICKET IT AUTHORIZES.

IN FACT, INTERLINE TICKETS NOT WRITTEN BY ACCREDITED AGENTS ARE FREELY ACCEPTED.

THE AGREEMENTS MAY BE ENTERED INTO BY CARRIERS WHO ARE NOT MEMBERS OF ATC OR IATA.

THE AGREEMENTS ARE VOLUNTARY. AN AIRLINE CAN ELECT NOT TO PARTICIPATE OR AGREE TO INTERLINE WITH ANY CARRIER OR CARRIERS OF ITS CHOOSING.

FINALLY, THE INDUSTRY AGREEMENT IS NON-EXCLUSIVE. AIRLINES MAY BILATERALLY OR MULTILATERALLY AGREE TO ANY TERMS THEY CHOOSE. SOME OF THESE AGREEMENTS DO NOT ENJOY ANTITRUST IMMUNITY; YET CARRIERS ENTER INTO THEM.

THE LESSON IS OBVIOUS: THE INTERLINE AGREEMENTS PROVE THAT A VOLUNTARY AND NON-EXCLUSIVE SYSTEM OF STANDARDS IS ENTIRELY SUFFICIENT TO SATISFY CONSUMER NEEDS WITHOUT STIFLING INDIVIDUAL CARRIER INITIATIVES. IN SHORT, INTERLINING PROVIDES ITS OWN ECONOMIC INCENTIVES TO PARTICIPATE.

IN ORDER TO PUT THIS ARGUMENT TO REST ENTIRELY, LET ME ASSURE THE COMMITTEE THAT THE BOARD WOULD BE VERY CONCERNED ABOUT AN EROSION OF THE INTERLINE SYSTEM. THE ONLY WAY TO STOP SUCH A DEVELOPMENT, HOWEVER, IS THROUGH DIRECT GOVERNMENT INTERVENTION. CONTINUATION OF EXCLUSIVITY PROVIDES ABSOLUTELY NO ASSURANCE THAT INTERLINING WILL CONTINUE. WE WILL CONTINUE TO MONITOR THE INTERLINE SYSTEM. IF THERE ARE CLEAR SIGNS THAT IT IS DETERIORATING, TO THE DISADVANTAGE OF THE CONSUMER, WE WILL NOT HESITATE TO TAKE APPROPRIATE ACTION. OUR INTEREST IS TO HAVE A SOLID, EFFICIENT AIRLINE SYSTEM -- BUT A TRULY COMPETITIVE ONE -- THAT ENSURES THE EFFICIENT USE OF ASSETS AND PEOPLE -- BECAUSE THAT WILL BEST SERVE THE PUBLIC INTEREST.

MAKE NO MISTAKE, HOWEVER: THE ISSUE IS REALLY WHETHER TRAVEL AGENTS SHOULD CONTINUE TO ENJOY A MONOPOLY ON PAYMENT FOR WRITING INTERLINE TICKETS.

* * *

What about the airlines?

Why do they seem to be unhappy with the Board's decision?

First, change is always upsetting.

The universal agency system is a security blanket.

Competition can be cold, hard, and unpredictable.

Airlines resisted deregulation of routes and fares also, but have since seen its benefits and don't want to turn back.

Second, exclusivity makes an airline executive's job easier. He doesn't have to worry that a competitor has devised or is using a cheaper marketing system. The only nondirect sales outlet permitted is the travel agent. As long as he pays a competitive commission rate -- and commission rates are essentially the same -- he will not be disadvantaged.

Third, I believe that the airlines do not feel entirely free to voice their concerns. Agents have the ability to affect airline revenues by shifting their business.

Travel agents believe they have the power to influence carrier decisions. When United proposed a flat commission the editor of Travel Trade praised the retaliatory action agents took against United.

> "Remember how quickly United's business melted away under the bright lights and heated reactions of travel agents in response to a plan which have eroded their commission percentages with each inflationary rise in air fares. It is (the editor's) hope that this experience taught every airline that when you try to take something away from travel agents which is rightfully theirs, you run the risk of having agents place their ticket sales with those carriers which do place a high value on their travel agency sales

> DISTRIBUTION SYSTEM.*** "I AM ABSOLUTELY POSITIVE THAT THE TRAVEL AGENT INDUSTRY HAS THE MARKETING MUSCLE AND THE SALES CLOUT TO MAKE OR VIRTUALLY BREAK ANY TRAVEL PRODUCT OR SERVICE. I AM EQUALLY CONVINCED THAT THERE ARE SOME TRAVEL PRINCIPALS, INCLUDING SOME SCHEDULED AIRLINES, WHO WILL VIOLENTLY DISAGREE WITH THIS CONTENTION, AND WHO WILL DECIDE TO TEST IT IN THE MARKETPLACE, EITHER OPENLY OR COVERTLY."
>
> * * *
>
> "THE BEST WAY TO MINIMIZE THE IMPLEMENTATION AND IMPACT OF MAXIMUM FARES IS TO LET ALL OF THE AIRLINES KNOW WHERE YOU STAND ON THIS ISSUE. IN THE WORDS OF MR. KOFZIGER 'DON'T GET MAD, GET EVEN.'" EICHNER (TICKETRON) 76 TR. 81-82 QUOTING TRAVEL TRADE OF AUGUST 31, 1981.

AFTER THE MARKETING DECISION TRAVEL AGENT MAGAZINE REPORTED THAT "AGENT CLOUT SHOULD KEEP AIRLINES LOYAL." IT REPORTED:

> "TRAVEL AGENTS ACROSS THE COUNTRY, FOR THE MOST PART, FEEL THE AIRLINES WILL STICK TO THEIR GUNS AND DEAL ONLY WITH RETAILERS--THIS DESPITE COMPETITIVE PRESSURE AND THE RECENT CAB DECISION ALLOWING CARRIERS TO DEAL WITH NONAPPOINTED VENDERS.
>
> HOWEVER, THE TRAVEL AGENT'S SPOTCHECK SHOWED MANY AGENCIES READY TO FIGHT FIRE WITH FIRE SHOULD AIRLINE PLATES AND STOCK BEGIN SHOWING UP IN UNLIKELY PLACES.
>
> * * *
>
> RON CARR, OWNER OF RON CARR TRAVEL IN DALLAS, SAID, "I FEEL THE AIRLINES SHOULD BE ABLE TO JUST KEEP DEALING WITH AGENTS. MY FEELING IS THE UNITEDS, THE TWAS, THE AMERICANS AND THE DELTAS HAVE A LOT OF MONEY INVESTED IN THEIR COMPUTER SYSTEMS INSTALLED IN AGENCIES.
>
> "NOT ONLY THAT, RETAILERS STILL HAVE A LOT OF BUSINESS CLOUT. YOU REMEMBER WHAT HAPPENED WHEN FRONTIER (REDUCED) COMMISSIONS TO NINE PERCENT AND A COUPLE OF OTHER AIRLINES FOLLOWED.
>
> "WE SCREAMED REAL LOUD AND BOOKED WITH AIRLINES THAT PAID 10 PERCENT. I DON'T SEE A MASS MOVEMENT BY AIRLINES TO NON-APPOINTED LOCATIONS OR BUSINESSES. YOU MAY SEE SOME SMALLER CARRIERS AND THOSE IN FINANCIAL TROUBLE GOING THAT WAY.
>
> "ITS GOING TO TAKE A GUTSY AIRLINE TO MAKE THE FIRST MOVE. IF THEY DO, WE JUST WON'T SELL THEM. I DON'T KNOW ANYTHING ELSE AGENTS CAN DO BUT USE THIS BUSINESS CLOUT."

TRAVEL AGENT JANUARY 10, 1983.

OUR DECISIONS CITE A NUMBER OF OTHER INSTANCES IN WHICH TRAVEL AGENTS INFLUENCE AIRLINE DECISIONS. ORDERS 82-12-85 AT PAGES 46-47 AND 83-3-127 AT 16.

IF YOU WERE AN AIRLINE MANAGER, I SERIOUSLY DOUBT YOU WOULD WANT TO TEST THE AGENTS' POWER TO DIVERT BUSINESS TO OTHER CARRIERS.

IN SHORT, I BELIEVE THAT AIRLINES FEEL BOXED IN. IF THEY TAKE ANY POSITION THAT IS PERCEIVED AS AGAINST THE TRAVEL AGENTS' INTEREST, THEY RISK RETALIATION. THE RISK IS SUBSTANTIAL BECAUSE OF THE OVERWHELMING VOLUME OF AGENCY SALES. AND SOME AGENT ORGANIZATIONS HAVE MADE OVERTURNING THE BOARD'S DECISION THEIR MAJOR OBJECTIVE.

FINALLY, ANOTHER CLUE ABOUT WHAT MAY BE WRONG WAS PROVIDED IN THE HEARING LAST MONTH ON AIRLINE COMPUTER RESERVATION SYSTEMS. CARRIERS THAT PROVIDE COMPUTER RESERVATION SYSTEMS HAVE A VESTED INTEREST IN RETAINING A UNITARY TRAVEL AGENT SYSTEM BECAUSE THEY CONTROL THE COMPUTERS UPON WHICH TRAVEL AGENTS HAVE COME TO DEPEND. THE SYSTEMS THAT GIVE A PREFERENCE TO THE HOST AND COHOST AIRLINES STEER MORE TRAFFIC TO THEM. ANY EFFECTIVE ALTERNATIVES TO THE AGENCY SYSTEMS WILL TEND TO DILUTE THIS EFFECT.

IN THIS CONNECTION, I'D LIKE TO ADDRESS AN ARGUMENT YOU MAY WELL HEAR TODAY, THAT UNBIASED INDUSTRY AGENTS WILL BE REPLACED BY CAPTIVE AGENTS REPRESENTING ONLY ONE CARRIER.

THE REALITY IS THAT DEREGULATION HAS ALREADY MADE SUBSTANTIAL CHANGES. COMMISSION INCENTIVES, BIASED COMPUTER SYSTEMS, AND INTENSE PRICE AND SERVICE COMPETITION AMONG AIRLINES HAVE AFFECTED THE MARKETING ENVIRONMENT. THIS INCLUDES OVERRIDE COMMISSIONS TO INFLUENCE AGENTS AWAY FROM IMPARTIAL JUDGMENTS IN BOOKING TICKETS.

BUT THIS DOES NOT MEAN THAT EXCLUSIVE DEALERSHIPS ARE AN INEVITABLE RESULT OF COMPETITION.

MANY RETAILERS FIND IT IN THEIR INTEREST TO MAXIMIZE THE NUMBER OF PRODUCTS OFFERED. THEY FIND THAT CONSUMERS PREFER TO BE ABLE TO COMPARE ALL THE GOODS OR SERVICES AVAILABLE TO THEM AT ONE TIME. THE RETAILER IS THEN ABLE TO SELL TO VARIOUS PURCHASERS WITH A WIDE VARIETY OF TASTES AND PREFERENCES. THIS TRANSLATES TO INCREASED PROFITS. FOR EXAMPLE, MANY STOCK BROKERAGE FIRMS ARE REPRESENTED ON A NUMBER OF MARKETS AND INDEPENDENT INSURANCE BROKERS REPRESENT A NUMBER OF INSURANCE COMPANIES. IT IS ALSO TRUE WHEN GOODS ARE SOLD. GROCERIES AND LIQUOR STORES ARE TWO EXAMPLES.

THE CAPTIVE AGENT SCENARIO IS ALL THE MORE UNLIKELY BECAUSE THE RELATIONSHIPS HAVE ALREADY BEEN ESTABLISHED. A BREAKDOWN IN THE CURRENT DISTRIBUTION MODE WOULD REQUIRE CARRIERS TO WITHDRAW THEIR PLATES EN MASSE OR AGENTS TO RELINQUISH THEIR RIGHTS TO PLATE A CARRIER. IN FACT ASTA'S OWN WITNESS TESTIFIED THAT EACH AIRLINE WOULD "GRANDFATHER" ALL OF THE AGENTS WITH WHICH IT HAD BEEN DEALING. NATHAN (ASTA) 72 TRANSCRIPT 149-50, 163-65.

THE CARRIER PURSUING A CAPTIVE AGENT STRATEGY WOULD BE FORFEITING SALES WITHOUT ANY APPARENT GAIN. THE AGENT WOULD BE GIVING UP A WIDE REVENUE BASE DERIVED FROM A NUMBER OF CARRIERS. IT IS VERY IMPLAUSIBLE TO BELIEVE THAT AN AIRLINE COULD ACCOUNT FOR SO MANY LOCAL SALES THAT IT COULD SATISFY THE DEMAND OF ALL THE AGENTS' CUSTOMERS.

SIMILARLY, EVEN VERY HIGH COMMISSION RATES WOULD BE UNLIKELY TO COVER THE LOSS OF VOLUME IN TICKET SALES ON OTHER CARRIERS. WHILE SOME EXCLUSIVE AGENTS MAY DEVELOP, THEY ARE LIKELY TO BE FOUND, IF AT ALL, IN VERY HIGH

DENSITY MARKETS. THEY WILL NOT SUPPLANT SALES OUTLETS WITH WIDE REPRESENTATIONS.

THERE IS NOTHING INTRINSICALLY WRONG WITH OUTLETS THAT SELL ONLY ONE OR A FEW LINES. CONSUMERS CAN READILY IDENTIFY RETAILERS THAT SPECIALIZE. IF A SERIOUS PROBLEM OF UNFAIR COMPETITIVE PRACTICES OR DECEPTION WERE TO OCCUR, VARIOUS AGENCIES, AT LOCAL, STATE AND FEDERAL LEVEL -- INCLUDING THE CAB -- CAN STEP IN TO CORRECT IT.

* * *

TRUE CONSUMER PROTECTION LEGISLATION IS NOT AT ALL INCOMPATIBLE WITH COMPETITIVE DISTRIBUTION OF AIRLINE TICKETS.

ASTA HAS ARGUED THAT CONTINUED CAB REGULATION IS NECESSARY TO KEEP THE STATES FROM STEPPING IN TO REGULATE THE COMPETENCY AND HONESTY OF TRAVEL AGENTS.

SOME STATES ALREADY REGULATE TRAVEL BUSINESS. THERE IS NO FEDERAL PREEMPTION THAT DERIVES FROM BOARD APPROVED PROGRAMS.

MOREOVER, IT IS NOT AT ALL OBVIOUS WHY A UNIFORM TRAVEL SALES SYSTEM IS NECESSARY. IF A STATE WANTS TO PROVIDE SOME PROTECTION FOR ITS CITIZENS, THIS LEGISLATIVE JUDGMENT WILL PRESUMABLY BE BASED ON ITS VIEW OF CONSUMER NEEDS.

ON THE OTHER HAND, THE STANDARDS WHICH COMPETITORS AGREE UPON MAY BE DESIGNED MORE TO PROTECT THEIR NARROW INTERESTS THAN THE INTERESTS OF THE CONSUMER.

A REVIEW OF STATE LAWS PROVIDES SUPPORT FOR THIS VIEW. (SEE APPENDIX C.)

First, several states have laws governing nonaccredited tour operators who provide bus and rail tickets. Generally, they are required to post a bond. One point to be noted is that there has been no noticeable outcry about the incompetence of these particular travel vendors.

Second, bonding is generally all that is deemed necessary to protect consumers interests. The bonds often exceed those required by ATC.

Only Rhode Island provides for licensing using alternative educational and testing standards, which do not exempt ATC accredited agents. This contrasts with the experience standards of ATC. Finally, we should note that ASTA, in fact, has strongly supported state regulation bills, for example in Connecticut, New York, and California.

If Congress desires preemption of state regulation and true federally mandated, consumer protection guarantees, it can achieve these goals only through direct Federal regulation. H.R. 2053 would do nothing to advance these goals.

* * *

How will the Board's decision provide greater public benefits? Have we given up a sure thing for speculative benefits?

Some of the beneficial aspects of potential competition are already beginning to surface. Many agents have begun to evaluate how they can provide better services to passengers. A sample observation in the travel press is attached as Appendix D.

Moreover, some travel agent observers have suggested that the prospect of competition will discourage entry by individuals who are not serious

ABOUT PROVIDING TRUE CUSTOMER SERVICE. (TRAVEL AGENT MAGAZINE JUNE 6, 1983 AT 44.) THE BOARD'S DECISION TALKS ABOUT THE THREAT OF POTENTIAL COMPETITION AS AN IMPORTANT PROD TO EFFICIENT OPERATIONS. AS THESE ARTICLES DEMONSTRATE, IT'S NOT JUST A THEORY; IT WORKS IN REALITY.

THESE BENEFITS WILL TAKE SOME TIME TO DEVELOP.

INNOVATIVE MARKETERS SHOULD NOT BE EXPECTED TO ENTER INSTANTANEOUSLY -- THEY WILL NEED TIME TO FORMULATE PLANS AND MAKE ARRANGEMENTS.

WE DIDN'T SEE NEW AIRLINES START OPERATIONS THE DAY AFTER THE DEREGULATION ACT PASSED EITHER.

IT'S ALSO UNREALISTIC TO DEMAND PROOF BEYOND A REASONABLE DOUBT THAT COMPETITION WILL PRODUCE DRAMATIC BENEFITS.

THERE ARE A LOT OF TRAVEL AGENTS OUT THERE -- SMALL AND LARGE -- THAT HAVE GOOD IDEAS WORTH PURSUING IN A TRULY FREE MARKET. IN THIS REGARD, THE BOARD'S DECISION WILL HELP MANY TRAVEL AGENTS BECAUSE THEY CAN NOW BRING THEIR ENTREPRENEURIAL SKILLS TO BEAR, FOR THE FIRST TIME, WITHOUT HAVING TO CONVINCE ALL AIRLINES AND ALL OTHER AGENTS TO CHANGE THE SYSTEM. THERE ARE INDICATIONS ALREADY THAT A NUMBER OF AGENTS WELCOME THE CHALLENGE.

MANY AGENTS FEEL THAT ATC AND IATA PLACE UNREASONABLE LIMITATIONS ON THE WAY TRAVEL AGENTS DO BUSINESS. THEY ARE LOOKING FOR BETTER WAYS TO DO BUSINESS. INDEED, SOME YEARS AGO THERE WAS CONSIDERABLE DEBATE IN AGENCY ORGANIZATIONS ABOUT THE POTENTIAL BENEFITS TO AGENTS FROM THE APPLICATION OF PROCOMPETITIVE POLICIES. (SEE APPENDIX E.) IN 1978 ASTA SUGGESTED THAT ALL ANTICOMPETITIVE AGREEMENTS BE DISAPPROVED WITHIN 5 YEARS. (SEE APPENDIX F.)

IT'S OBVIOUS, THOUGH, THAT "COMPETITION" TODAY EXISTS ONLY IN THE NUMBER OF TRAVEL AGENCIES THAT ARE DOING BUSINESS IN THE SAME WAY.

MANY ATC AND IATA ACCREDITATION PROVISIONS ARE NOT SIMPLY MINIMUM STANDARDS TO INSURE TRAVEL AGENT COMPETENCE.

THEY CONTROL MANY ASPECTS OF THE BUSINESS.

WHEN COUPLED WITH AN INDUSTRY AGREEMENT TO DEAL ONLY WITH PERSONS MEETING THESE STANDARDS, NORMAL GROWTH AND DEVELOPMENT IS STUNTED.

TO SELL AIRLINE TICKETS YOU HAVE TO SATISFY THE ATC THAT YOU MEET THE FOLLOWING STANDARDS, AS WELL AS A NUMBER OF OTHER REQUIREMENTS:

-- EMPLOY A MANAGER AT EVERY LOCATION WITH TWO YEARS EXPERIENCE PROMOTING TRANSPORTATION;

-- HAVE AN EMPLOYEE WITH ONE YEAR TICKET WRITING EXPERIENCE GAINED WITH AN ATC OR IATA CARRIER OR TRAVEL AGENCY;

-- HAVE A LOCATION THAT IS OPEN AND ACCESSIBLE TO THE GENERAL PUBLIC AND CLEARLY IDENTIFIED AS A TRAVEL AGENCY;

-- HAVE THE QUALIFYING MANAGER ON DUTY AND BE OPEN FOR BUSINESS 35 HOURS A WEEK; AND

-- NOT APPEAR LIKELY TO DO MORE THAN 20 PERCENT OF ITS BUSINESS WITH AN AFFILIATED CORPORATION, ITS SHAREHOLDERS OR EMPLOYEES (IN ANY EVENT, ANY AFFILIATED SALES ARE NOT COMMISSIONABLE).

A LOT OF PEOPLE DON'T MEET THESE REQUIREMENTS. THEY ARE BARRED AT THE DOOR. ATC CLAIMS THAT ONLY 5% OF "SERIOUS" APPLICATIONS ARE DENIED.

BUT WHAT THEY DON'T TELL YOU IS THAT THEY USUALLY SEND OUT A LETTER OR

TALK TO PEOPLE ABOUT THE ATC STANDARDS FIRST. MANY MORE PEOPLE THAN ARE EVER ACCREDITED ARE INTERESTED ENOUGH TO WRITE OR PHONE ATC. (SEE CHART NO. 8.)

MOST OF THOSE THAT DO NOT QUALIFY UNDER ONE OR MORE OF THESE STRICT REQUIREMENTS DO NOT APPLY. BUT IT IS FALLACY TO ASSUME THAT ALL THOSE WHO INQUIRE BUT DO NOT APPLY ARE NOT "SERIOUS" CANDIDATES.

THAT THESE REQUIREMENTS ARE NOT SIMPLY MINIMUM STANDARDS THAT ARE NEEDED TO ASSURE COMPETENCY IS ILLUSTRATED BY INDIVIDUAL AIRLINE PRACTICES. AIRLINES ALLOW BUSINESS TRAVEL DEPARTMENTS (BTD'S), TRADE ASSOCIATIONS AND UNIVERSITIES TO WRITE TICKETS BASED ON THE SAME INFORMATION AVAILABLE TO AGENTS. AIRLINES ALSO GIVE CORPORATE OR OTHER OFFICES THEIR BLANK AIRLINE TICKET STOCK EVEN THOUGH THE INDIVIDUALS THEY EMPLOY DO NOT MEET THE ATC OR IATA STANDARDS. IN-PLANT AGENCY BRANCH LOCATIONS ON CUSTOMER PREMISES ALSO DO NOT SATISFY THE ATC OR IATA REQUIREMENTS. THEY OFTEN USE CUSTOMER EMPLOYEES. INDEED, THEY ARE OFTEN INDISTINGUISHABLE IN FUNCTION FROM BTD'S THEY REPLACE.

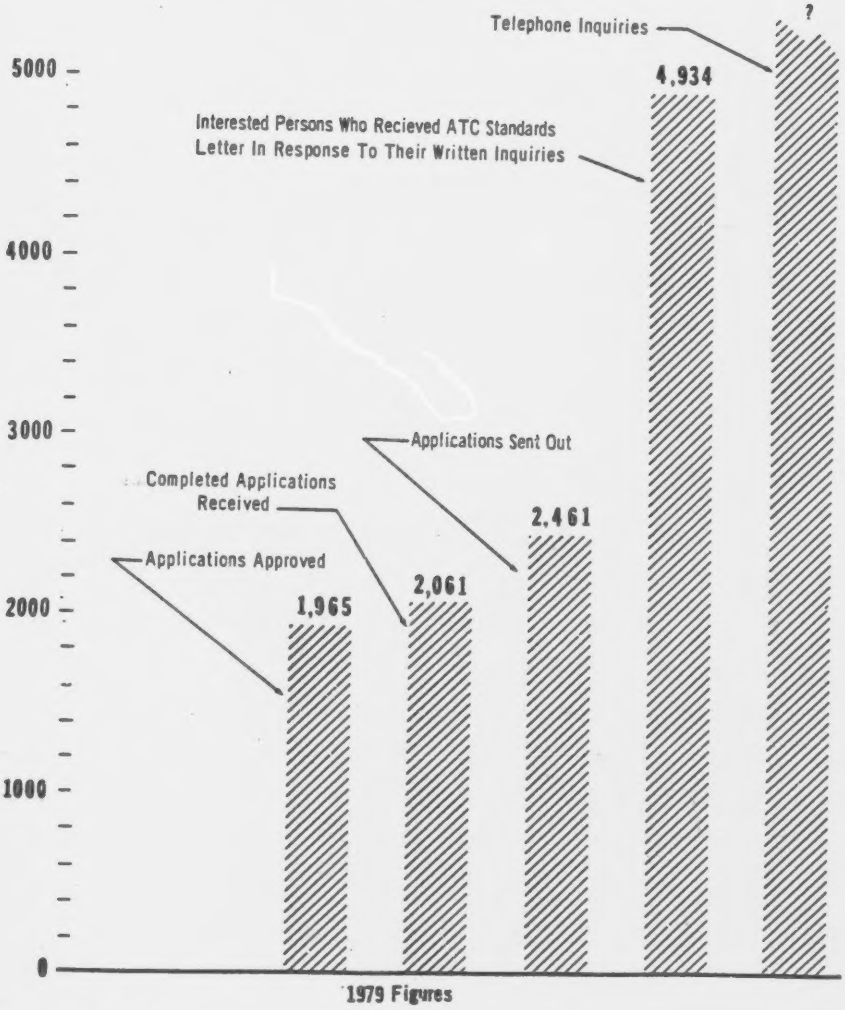
THESE ARE REAL-LIFE EXAMPLES OF SUBSTANTIAL EXCEPTIONS TO THE ATC/IATA STANDARDS. IF THE STANDARDS ARE CRUCIAL, AS CLAIMED, THEN WE ALREADY HAVE A LOT OF UNQUALIFIED PEOPLE WRITING TICKETS. THAT DOES NOT SEEM TO BE THE CASE. THE REAL ISSUE IS NOT WHO WRITES THE TICKET, BUT WHO GETS PAID.

SOME CORPORATIONS AND ASSOCIATIONS ARE INTERESTED IN GETTING TICKET WRITING COMPENSATION WITHOUT HAVING TO SET UP AN IN-PLANT. BUT THEY WERE BARRED FROM ESTABLISHING AN AGENCY OR GETTING TICKET WRITING COMPENSATION.

THE BOARD'S DECISION ON BTD'S DOES NOT PROVIDE THAT BTD'S CAN AUTOMATICALLY GET TRAVEL AGENT COMMISSIONS, EITHER NOW OR AFTER THE TWO-YEAR TRANSITIONAL PERIOD.

CHART No. 8.

THE NUMBER OF FORMAL APPLICATIONS DENIED DOES NOT REFLECT THE ACTUAL NUMBER OF PERSONS THE ATC RULES KEEP OUT OF THE INDUSTRY



SOURCE: ATC-T-1 of '54

THE BOARD ONLY SAID THAT AIRLINES COULD NOT COLLECTIVELY AGREE TO BOYCOTT BTD'S -- OR ANY OTHER POTENTIAL DISTRIBUTOR.

AIRLINES ARE FREE TO DECIDE INDIVIDUALLY NOT TO COMPENSATE A BTD OR TO PAY LESS THAN A FULL COMMISSION.

* * *

I HAVE ALREADY IDENTIFIED A NUMBER OF REAL-LIFE EXAMPLES OF NEW WAYS OF MARKETING AIRLINE TICKETS THAT HAVE BEEN NEEDLESSLY EXCLUDED. I HAVE ALSO IDENTIFIED SOME OF THE RESTRICTIVE PROVISIONS OF THE ATC/IATA AGREEMENTS. TYING THE TWO TOGETHER, WE CAN IDENTIFY OTHER TYPES OF BUSINESSES THAT ARE EFFECTIVELY PRECLUDED FROM MARKETING TO AIRLINE PASSENGERS.

THERE ARE TWO MEANS OF DISCOURAGING ENTRY: OUTRIGHT PROHIBITION OF CERTAIN BUSINESS PRACTICES AND THE IMPOSITION OF COSTS THAT MAKE IT UNECONOMIC TO OPERATE.

IN THE FIRST CATEGORY, THE PHYSICAL LOCATION REQUIREMENT PRECLUDES OPERATION OF A MARKETING OUTLET THAT CONDUCTS BUSINESS EXCLUSIVELY OVER THE TELEPHONE.

FOR EXAMPLE, THIS ELIMINATES THE POSSIBILITY OF BUYING SERVICES THAT OFFER DISCOUNTED MERCHANDISE OPERATING IN CONJUNCTION WITH AN 800 NUMBER NETWORK.

THE PROMOTIONAL SERVICES NOW OFFERED THROUGH CREDIT CARD COMPANIES ARE EXCLUDED.

THE PAYMENT OF A COMMISSION FOR TAKING A RESERVATION OVER PERSONAL COMPUTER SYSTEMS IS FORECLOSED.

THE MORE SUBTLE FORM OF EXCLUSION AT WORK NOW IN THE MARKETPLACE INVOLVES MAKING IT FINANCIALLY UNATTRACTIVE FOR LARGE FIRMS DEALING IN RELATED TRAVEL, TICKETING, OR MERCHANDISING OF SERVICES TO ENTER. EVERY LOCATION -- EXCEPT IN-PLANTS -- MUST HAVE PERSONNEL AND MANAGERS MEETING THE ATC REQUIREMENTS. THIS IMPOSES TREMENDOUS COSTS ON COMPANIES SUCH AS SEARS OR TICKETRON. INDEED, AMERICAN EXPRESS URGED US TO DISAPPROVE THE MANAGEMENT STANDARDS FOR BRANCH OFFICES. WHILE WE DID NOT DISAPPROVE THAT RULE, OUR DISAPPROVAL OF EXCLUSIVITY AFFORDS AMERICAN EXPRESS THE FLEXIBILITY TO DEAL OUTSIDE THE AGENCY SYSTEM UNDER DIFFERENT STANDARDS.

THE BOARD DECISION WILL ULTIMATELY OFFER CONSUMERS A WAY TO PAY FOR ONLY WHAT THEY USE.

NEW TICKET OUTLETS COULD SPECIALIZE IN CATERING TO PASSENGERS WHO KNOW EXACTLY WHAT THEY WANT. THOSE TICKETS, WHICH WOULD REQUIRE LITTLE EFFORT TO WRITE, COULD BE SOLD AT A LOWER COST. COMPETITION WILL THUS OFFER CONSUMERS A CLEAR GAIN, THROUGH A WIDER CHOICE OF SERVICE AND PRICE OPTIONS.

IN AIR TRAVEL THERE WILL BE CHOICES. BUT THE END PRODUCT -- AN AIRLINE SEAT -- WILL BE THE SAME REGARDLESS OF HOW IT IS ACQUIRED.

WE ARE ALREADY SEEING THE FIRST HINTS OF THIS KIND OF PRICE COMPETITION AS HIGH VOLUME AGENCIES ARE REPORTEDLY RETURNING PORTIONS OF THEIR COMMISSIONS TO SELECTED CUSTOMERS, SUCH AS CORPORATIONS. IN ESSENCE THEY ARE PASSING ON SOME OF THE BENEFITS TO BE GAINED BY THEIR MORE EFFICIENT OPERATIONS. SINCE THESE EFFICIENCIES ARE EVIDENTLY ACHIEVABLE, IT IS ONLY A MATTER OF TIME BEFORE THE GENERAL PUBLIC WITH UNCOMPLICATED

TRAVEL DEMANDS WILL BENEFIT. IN THE END, ALL PASSENGERS WOULD BENEFIT BECAUSE OF REDUCED MARKETING COST TO THE AIRLINES.

NOT ALL AIRLINES MAY WISH TO PARTICIPATE IN THESE MARKETING SCHEMES. BUT THE POINT IS THAT THEIR COMPETITORS AND EXISTING DISTRIBUTORS, ACTING TOGETHER, SHOULD NOT BE ABLE TO PROHIBIT THE USE OF OTHER DISTRIBUTION MODES.

PRIOR TO THE BOARD'S DECISION THE PRICE FOR EXPERIMENTATION WAS LOSING THE AUTOMATIC REPRESENTATION OF THE 22,000 ATC AND IATA AGENTS.

THIS WAS SO SEVERE THAT NO MAJOR CARRIER COULD AFFORD TO EXPERIMENT WITH LOW COST ALTERNATIVES.

COMPETITION, AS ALLOWED BY OUR *CMI* DECISION, OFFERS THE OPPORTUNITY FOR CLEAR GAINS TO CONSUMERS IN A WIDER ARRAY OF SERVICES AND PRICE OPTIONS. BUT NO AIRLINE CAN BE EXPECTED TO STICK ITS NECK OUT UNTIL CONGRESS ENDS THE THREAT THAT EXCLUSIVITY WILL BE REIMPOSED.

* * *

THE BOARD'S ORDER ATTEMPTS TO FIX THE SYSTEM BY ALLOWING COMPETITION. BUT IT RECOGNIZES THAT THERE IS NO NEED TO GO BACK TO THE BEGINNING AND START OVER AGAIN.

A JOINT SYSTEM HAS MANY BENEFITS. BUT IT IS NOT THE ONLY OR BEST WAY TO DO BUSINESS. FOR THAT REASON, THE BOARD FREED AIRLINES TO SET UP OTHER DISTRIBUTION METHODS. ONCE THE NEEDLESSLY RESTRICTIVE ASPECTS OF THE AGREEMENTS ARE REMOVED, THE JOINT SYSTEM OF MARKETING WILL RETAIN ONLY THOSE FEATURES THAT PRODUCE PUBLIC BENEFITS.

THE ATC AND IATA TRAVEL AGENCY PROGRAMS WILL SURVIVE IF THEY ARE SUBJECT TO THE SAME RULES OF COMPETITION -- THE ANTITRUST LAWS -- THAT APPLY TO UNREGULATED INDUSTRIES.

THE ANTITRUST LAWS DO NOT PROHIBIT COMPETITORS FROM ENGAGING IN COOPERATIVE ACTIVITY. THEY MERELY PROHIBIT COMPETITORS FROM COOPERATING IN WAYS THAT HAVE A SIGNIFICANT ADVERSE EFFECT ON COMPETITION. THERE ARE DOZENS OF EXAMPLES OF COOPERATIVE ACTIVITIES BY THE AIRLINES GOING ON RIGHT NOW THAT ARE NOT PROTECTED FROM ANTITRUST ATTACK.

ONE EXAMPLE IS THE AIRLINE CLEARINGHOUSE. IT PERFORMS ESSENTIALLY THE SAME SERVICE AS THE AREA SETTLEMENT PLAN, EXCEPT THE CLEARINGHOUSE SETTLES ACCOUNTS BETWEEN AIR CARRIERS, RATHER THAN BETWEEN AGENTS AND AIR CARRIERS. IT HAS OPERATED WITHOUT IMMUNITY SINCE ITS INCEPTION IN THE 1940'S.

ANOTHER EXAMPLE FROM THE AIRLINE INDUSTRY INVOLVES THE CONSOLIDATED AIR TOUR MANUAL. CATM LISTS TOURS, GENERALLY COMBINED ACCOMMODATION AND TRANSPORTATION PACKAGES, IN A CONSOLIDATED LISTING OF AVAILABLE PROGRAMS. THAT PROGRAM IS NOW OPERATED WITHOUT IMMUNITY. IN FACT, THE ONLY LAWSUIT WE COULD FIND INVOLVING CATM OCCURRED WHEN IT WAS IMMUNIZED. IN E.A. MCQUADE TOURS, INC. V. CONSOLIDATED AIR TOUR MANUAL COMMITTEE, 467 F.2D 178, 188 5TH CIR. (1972) THE COURT UPHELD THE IMPOSITION OF REASONABLE INTEGRITY AND RESPONSIBILITY STANDARDS.

ANOTHER PARTICULARLY RELEVANT EXAMPLE INVOLVES AGREEMENTS BY WHICH COMMUTER AIRLINES AFFILIATE THEMSELVES WITH A CERTIFICATED CARRIER, USE THAT CARRIER'S NAME, OFFER INTEGRATED SCHEDULES, AND ENTER INTO SPECIAL OPERATIONAL ARRANGEMENTS THAT ARE MUCH MORE EXTENSIVE THAN INTERLINING. AN example of this kind of agreement is the Allegheny Commuters agreement. In Order 79-2-108, the Board concluded that there was nothing inherently anticompetitive in these arrangements and therefore proposed to withdraw antitrust immunity after two years, which allowed time for modifications to eliminate antitrust concerns. We modeled our action in the *OMI* on this experience.

Parties in the *Allegheny* case had argued that the agreements were anticompetitive and that carriers would not enter into beneficial interline arrangements in the absence of antitrust immunity. These dire predictions were proven false by subsequent events. Commuter agreements are now a common occurrence. We are not aware of any antitrust lawsuits challenging them.

Other airline joint cooperative ventures that do not have antitrust immunity include the Universal Air Travel Plan (Order 80-6-66), a clearinghouse for spare parts, and an airline joint venture for consolidated cargo pick-up and delivery service in the United States (Order 81-11-121). Every time the Board proposed lifting immunity -- as it did in the cited cases -- we heard the argument that antitrust immunity was essential. But if carriers really want to engage in a particular activity, they will find a way to do it.

Among the other cooperative activities that go on every day without immunity are the real estate multi-listing services, the various wire services, sports leagues, such as the Professional Golfers' Association and

THE NATIONAL FOOTBALL LEAGUE, AND TRADE ASSOCIATIONS THAT ROUTINELY FACILITATE LEGITIMATE INFORMATION DISSEMINATION AND INDUSTRY STANDARDIZATION.

THE CONFERRAL OF IMMUNITY IS THE EXCEPTION, NOT THE RULE.

DOZENS UPON DOZENS OF COOPERATIVE ACTIVITIES GO ON WITHOUT IT EVERY DAY.

PERSONS WHO ENGAGE IN THEM, INCLUDING AIRLINES AND AGENTS, RUN THE RISK OF BEING SUED FOR TREBLE DAMAGES, BUT IT IS A RISK THEY ACCEPT AND DEAL WITH.

NO AIRLINE CAN AFFORD TO GIVE UP ITS PRIMARY DISTRIBUTION SYSTEM. NO AIRLINE IS GOING TO ABANDON THE SOURCE OF OVER 60 PERCENT OF ITS REVENUE BEFORE A LAWSUIT IS EVEN FILED.

YOU MAY BE TOLD THAT THE AGENCY SYSTEM WILL COLLAPSE UNLESS ANTITRUST IMMUNITY IS RETAINED. BUT THAT IS SIMPLY NOT TRUE. THE FACT IS THAT THE AIRLINES CAN -- AND WILL -- DESIGN CONFERENCE PROGRAMS THAT COMPLY WITH THE ANTITRUST LAWS.

IN FACT, THE BOARD'S ORDER SUGGESTED SOME CHANGES THAT WOULD BRING THE CURRENT SYSTEM MORE IN LINE WITH THE FEDERAL ANTITRUST LAWS.

IN VIEW OF THE SUBSTANTIAL BENEFITS OF THE CONFERENCE PROGRAMS AND THE AREA SETTLEMENT PLAN, AIRLINES WILL NOT ABANDON THE CONFERENCE SYSTEM BECAUSE OF THE THREAT OF UNJUSTIFIED, FRIVOLOUS LAWSUITS. IN FACT, A MAJOR AIRLINE EXECUTIVE RECENTLY CAME TO THE VERY SAME CONCLUSION. JOHN ZEEMAN, SENIOR VICE PRESIDENT FOR MARKETING OF UNITED AIRLINES RECENTLY RESPONDED TO A SERIES OF QUESTIONS ON IMMUNITY AS FOLLOWS:

> Q: Looking at the marketing case implications, we could be less than two years away from the elimination of antitrust immunity for a number of things starting with the agency program itself. If the immunity goes away and the ATC and IATA agency programs as such go away, what does that do to the way you distribute the product?
>
> Zeeman: As I said previously, very little. Because as far as we are concerned, we are going to continue to operate through travel agencies. My personal feeling is that the area settlement plan is here to say.
>
> Q: With or without immunity?
>
> Zeeman: With or without immunity. It is not an anticompetitive operation. I think it would pass any strain that the Justice Department would put on it.
>
> Q: It has been suggested, though, that carriers would abandon it if they lost the umbrella of antitrust immunity.
>
> Zeeman: There may be some that would. I doubt it. I think that from our evaluation of that system it will pass any screen.
>
> And I think most other carriers will come to the same conclusion and they will realize that it is a very effective way for both the airlines and the agencies to conduct their business. I don't see that going away with or without antitrust immunity.
>
> The same thing I would say of interlining in terms of baggage. The basic way that the airline industry conducts its business, I think, would be retained with or without antitrust immunity. Travel Weekly, May 16, 1983, at 8.

Protection from the antitrust laws is extraordinary relief, not available to most business. Although I cannot deny that frivolous lawsuits can happen, the proper remedy is not to pass out immunity to a few favored industries. There have been suggestions about improving the antitrust laws to discourage truly frivolous suits and that would seem to be the better way to respond to these concerns.

JUST LAST MONTH -- IN THE COMPUTER RESERVATIONS HEARINGS -- PEOPLE WERE TELLING YOU THAT MERITORIOUS LAWSUITS ARE TOO EXPENSIVE TO BRING. THESE ARE LARGELY CONTRADICTORY POSITIONS.

REGULATION NEVER FULLY PROTECTED AIRLINES FROM FRIVOLOUS OR MERITORIOUS LAWSUITS, SOME INVOLVING ANTITRUST. YET AIRLINES DID NOT STOP ENTERING INTO CONTRACTS, HIRING EMPLOYEES, OR FLYING ALTOGETHER BECAUSE OF THE CHANCE OF LITIGATION. PRESUMABLY, THEY TAILORED ALL THEIR BEHAVIOR IN THESE AREAS TO CUT DOWN ON THE CHANCE THEY WOULD ULTIMATELY BE FOUND LIABLE.

THE TRUTH OF THE MATTER IS THAT THE ARGUMENT ABOUT BOTH THE COSTS AND THE RISKS ARE GREATLY EXAGGERATED.

ADVOCATES OF RETAINING IMMUNITY TEND TO EXAGGERATE THE RISKS.

FOR EXAMPLE, IN EARLY MERGER CASES PARTIES ADVANCED ALL SORTS OF THEORIES ABOUT FRIVOLOUS LAWSUITS TO PERSUADE THE BOARD TO GRANT DISCRETIONARY ANTITRUST IMMUNITY AFTER REVIEW UNDER SECTION 408 (THIS STATUTE IS SUBSTANTIALLY SIMILAR TO SECTION 412 GOVERNING AGREEMENTS).

THE BOARD DECLINED; NO ONE SUED.

WHILE NOT ENTIRELY ANALOGOUS, THERE IS NO REASON TO DOUBT THAT CLAIMS FOR ANTITRUST IMMUNITY HERE ARE FOLLOWING THE SAME PATH.

THE ANTITRUST LAWS ARE NOT VAGUE OR ARBITRARY. EVEN IF A BUSINESS IS CONCERNED ABOUT THE LAWS, IT CAN SEEK ANTITRUST COUNSELING TO REDUCE THE RISK OF LAWSUITS. THE JUSTICE DEPARTMENT WILL, UPON REQUEST, REVIEW PROPOSED BUSINESS ACTIVITY TO REMOVE UNCERTAINTY ABOUT ITS ENFORCEMENT INTENTIONS.

Indeed, a spokesman for the Justice Department has already indicated that if ATC and IATA recast the agency provisions along the lines suggested by the CAB, DOJ would see no antitrust problem.

The non-obtrusive structure of the antitrust laws is more efficient than government regulation. The antitrust laws permit companies to monitor their own behavior so that the government need not intervene, except when there are deviations from competitive standards. The regulatory process which culminates in antitrust immunity is more intrusive because it involves detailed examination and monitoring of industry practices.

The benefit of the Board's approach is that the possibility of antitrust liability creates an incentive to ensure that the rules and the enforcement of these rules do not improperly restrict competition. That is the same incentive that keeps other cooperative ventures honest. But if the industry is immune, competition will inevitably be restrained.

The grant of antitrust immunity has both economic and social costs. It obviously costs airlines a lot of time and money.

Regulation creates costs for the government, and ultimately the taxpayer.

Antitrust immunity requires the government to review each agreement closely, since there is no private remedy. The Board must devote many hours to reviewing these agreements. Between 1951 and 1979 ATC amended its basic passenger agreement 250 times. Since 1979 ATC has submitted more than 60 amendments to the passenger agency agreements at issue in the Marketing case.

The review process is a difficult one.

It requires constant fine-tuning, constant monitoring and the government trying to foresee future consequences.

For example, in June ATC submitted revisions to their agreements that they said reflected the Marketing decision. In their revisions they included a requirement that airlines withdraw their individual ticket stock from an agency if ATC withdraws standard stock, despite the fact that we have repeatedly disapproved similar provisions in the recent past.

Agents often ask us to disapprove existing agreements because they believe they are too onerous. A list of such actions is attached as Appendix B. In the Marketing order, we disapproved the IATA airport restriction, and substantially revised the ATC personal guarantee rules. Travel agents are not complaining about these procompetitive actions.

There are other costs from a system that is not fully subject to the laws of competition. ATC and IATA are quasi-governments that apply the letter of the rules. The ATC standards have a history of being rigidly interpreted and applied.

For example, a recent ATC Commissioner decision found that an applicant did not have sufficient ticketing experience, even though the person has 14 years travel agency experience. The reason the application was denied was because the last two years' ticketing experience was in an in-plant location. This decision is attached as Appendix G.

Unlike the Board, which can grant exemptions to promote competition or advance the public interest, the ATC only has the power to apply the rules. The rules themselves cannot be changed without the agreement of a majority of the carriers. There has been some suggestion that H.R. 2053 is true deregulation because airline marketing decisions would be totally immune from administrative and judicial review. If this were true airlines and travel agents could dictate the terms on which consumers purchase tickets. It would create a tremendous potential for abuse. No industry is free from some type of accountability. Deregulation contemplates accountability under the antitrust laws.

The immunity issue is not a question of avoiding costs. The costs of a regulatory system are high. It is really a question of whether self-regulation, disciplined by the laws of competition, serves the public interest better than administrative oversight.

Neither system is perfect.

But it is the considered judgment of the Board, weighing the facts, law, and national aviation policy, that regulation comes in a poor second.

* * *

You might hear arguments that the Board has ignored the intent of Congress by ending antitrust immunity for the agency agreements. There is no support for the claim that the Board has in effect repealed §414 of the Act.

The Board was instructed by Congress in section 1601(c) to review and report on all its grants of antitrust immunity. This indicates the Congressional intent that the Board, in a programatic approach, review all

AGREEMENTS FILED PRIOR TO THE AIRLINE DEREGULATION ACT. ASTA URGED SUCH A REAPPRAISAL. (SEE APPENDICES F AND H.) AND IN TESTIMONY TO THE SENATE AVIATION SUBCOMMITTEE IN 1981 ATA ARGUED THAT CONGRESS SHOULD REPEAL THE BOARD'S POWER TO APPROVE AND IMMUNIZE AGREEMENTS AFFECTING DOMESTIC AIR TRANSPORTATION AFTER A FIVE YEAR TRANSITION PERIOD.

THE REPORT ON THE ADA INDICATED SOME TYPES OF AGREEMENTS THAT CONGRESS CONSIDERED TO BE UNACCEPTABLE, SOME THAT WERE CONSIDERED BENIGN, AND SOME THAT THE BOARD WAS TO TAKE A HARD LOOK AT. THE AGENCY AGREEMENTS FALL INTO THE LAST CATEGORY S. REP 95-631 AT 81-82, FEBRUARY 6, 1978.

THE FACT THAT THE BOARD HAS SELECTIVELY WITHDRAWN IMMUNITY IS NOT TANTAMOUNT TO A REPEAL OF SECTION 414. THERE ARE A NUMBER OF OUTSTANDING APPROVALS WITH IMMUNITY. SIGNIFICANTLY, THERE ARE ALSO INSTANCES WHEN THE BOARD HAS GRANTED DISCRETIONARY ANTITRUST IMMUNITY. FOR EXAMPLE, THE BOARD HAS GRANTED IMMUNITY TO THE DEFAULT PROTECTION PROGRAM.

* * *

FINALLY, I'D LIKE TO ADDRESS THE CLAIM THAT THE BOARD HAS DISREGARDED U.S. FOREIGN AVIATION POLICY AND THE VIEWS OF THE DEPARTMENT OF STATE IN ITS DECISION.

IT IS SOMEWHAT ANAMOLOUS THAT U.S. FOREIGN POLICY IS BEING DEFENDED BY FOREIGN AIRLINES. THE DEPARTMENT OF STATE HAS WAYS TO MAKE ITS FEELINGS KNOWN IF IT OBJECTS TO THE BOARD'S DECISION, BUT DOS DID NOT PETITION FOR RECONSIDERATION.

THE DEPARTMENT OF STATE DID FORWARD COMMUNICATIONS IT RECEIVED FROM FOREIGN GOVERNMENTS. IT ALSO URGED THE BOARD IN A LETTER EARLY IN THE PROCEEDING NOT TO TAKE ACTIONS WHICH WOULD DENY FOREIGN CARRIERS EQUAL ACCESS TO U.S. TRAFFIC. THE PRINCIPAL CONCERN SEEMED TO BE THE IATA COMMON ACCREDITATION PROGRAM, NOT EXCLUSIVITY OR ANTITRUST IMMUNITY.

THE CAB DID NOT DISTURB THE ACCREDITATION PROGRAM.

WE FEEL WE HAVE BEEN RESPONSIVE TO STATE'S CONCERN.

FOREIGN AIRLINES HAVE NEVERTHELESS COMPLAINED THAT THE BOARD'S DECISION DENIED THEM FAIR AND EQUAL ACCESS TO U.S. MARKETS. THIS ARGUMENT ASSUMES THAT ONLY CAPTIVE OUTLETS WILL EMERGE, AND THAT FOREIGN CARRIERS WOULD BE FINANCIALLY INCAPABLE OF SUPPORTING THEIR OWN OUTLETS.

AT THE VERY LEAST, IT IS SOMEWHAT PREMATURE TO OBJECT GIVEN THE IMPROBABILITY OF CAPTIVE AGENCIES. EVEN IF U.S. CARRIERS SET UP THEIR OWN OUTLETS, NO U.S. CARRIER HAS INTERNATIONAL OPERATIONS OF SUCH SCOPE THAT THEY WOULD BENEFIT FROM PROHIBITING SALES ON FOREIGN CARRIERS. AIRLINES NOW HAVE THEIR OWN CITY TICKET OFFICES WHERE THEY GLADLY SELL TICKETS NOT ONLY FOR FOREIGN CARRIERS BUT ALSO FOR THEIR DOMESTIC COMPETITORS. THE REASON IS RELATIVELY SIMPLE: THEY CAN MAKE MONEY OFF A SALE AND LOSE NOTHING IF THEY DO NOT COMPETE IN THAT MARKET.

U.S. CARRIERS ARE OFTEN DISCRIMINATED AGAINST OR EVEN EXCLUDED IN FOREIGN COUNTRIES' DISTRIBUTION SYSTEMS. IT IS PARTICULARLY INAPPROPRIATE FOR SOME OF THEM TO CONTEND THAT "FAIR AND EQUAL ACCESS" GIVES THEM THE RIGHT TO SAY HOW TICKETS WILL BE SOLD IN THE U.S.

DESPITE THE OCCASIONAL INEQUITIES, HOWEVER, THE BOARD HAS PLEDGED THAT IT WILL PROTECT FOREIGN CARRIERS' ABILITY TO MARKET THEIR SERVICES IN THIS COUNTRY FAIRLY AND EQUALLY.

SHOULD CIRCUMSTANCES CALL FOR BOARD INTERVENTION TO UPHOLD U.S. BILATERAL OBLIGATIONS, THE BOARD IS FULLY PREPARED TO STEP IN.

BUT PRESERVATION OF THE RESTRICTIVE AND EXCLUSIVE IATA AGENCY AGREEMENT ON THE SMALL CHANCE THAT CHANGES WOULD AFFECT OUR BILATERAL OBLIGATIONS WOULD BE LETTING THE TAIL WAG THE DOG.

* * *

TO SUM UP H.R. 2053 WOULD ABROGATE ACCEPTED ADMINISTRATIVE PROCEDURES, REVERSE THE POLICY OF AIRLINE DEREGULATION, AND INJURE CONSUMER INTERESTS. WHEN IT COMES TO SELECTING BETWEEN THE ECONOMIC GOOD OF THE MANY AND THE NARROW INTERESTS OF THE FEW, WE AS AMERICANS HAVE GENERALLY REJECTED THE IDEA OF SPECIAL TREATMENT.

* * *

Appendix A
Page 1 of 1.

TESTIMONY OF PAUL BESSEL
FOR ASTA
ON THE ATC AND IATA EXCLUSIVITY PROVISIONS

CAB
9/18
TAPE
4-A
RV-1

BY MR. RUDEN:

Q You were also asked some questions about ASTA's position on the ATC mail vote on exclusivity and the impact on ASTA's position of a different scope or interpretation of what the mail vote was about.

Can you clarify ASTA's view of the exclusivity rule in ATC, its resolution in relation to the similar or related rules of IATA with respect to that scope question?

A. Yes.

Without any question the two rules are intended to mean exactly the same thing. Slightly different language is used in the same way that slightly different language is used in the two resolutions relating to certain other subjects.

But in the discussions that took place at the two review sessions—that is, the ATC Review Committee and the IATA Review Committee—this subject was discussed extensively in both of those sessions, and there was no doubt whatsoever in our minds and I'm convinced in the minds of the other people working on those two committees that the intent and the effectiveness of the two provisions—that is, the ATC provision and the IATA provision—would be that they would have exactly the same effect even though slightly different language was used.

MR. RUDEN: That concludes the redirect.

JUDGE YODER: Recross?

Source: 70 Tr. 29.

BOARD DECISIONS INCREASING AGENTS FREEDOM TO COMPETE

Appendix B
Page 1 of 2

All of the following decisions were based on the rejection of carrier agreements in favor of competition.

a. By Orders 80-2-33, February 5, 1980 and 80-2-159, May 23, 1980 the Board disapproved provisions of the ATC agreements fixing the rate at which member air carriers could compensate travel agents for their services. While many travel agents and travel agent organizations originally opposed "open commissions" they subsequently reversed their position. Commissions have steadily risen since the Board's action and it is now widely acknowledged in the travel agent industry as a wise decision.

b. By Orders 80-12-91, December 18, 1980 and 81-5-20, May 6, 1981 the Board disapproved provisions ATC and IATA agreements prohibiting the payment of travel agent commissions on the sale of official government travel purchased with a government travel request or other purchase contract. The Board's action was taken in response to requests by the Department of Defense and the American Society of Travel Agents (ASTA).

c. By Order 81-6-175, June 30, 1981 the Board, at the request of a number of IATA cargo agents, stayed the implementation of the IATA cargo accounts settlement system, insofar as it would require IATA cargo agents to participate. The Board disapproved the restrictive provisions in the marketing case.

d. Order 80-11-138, November 26, 1980, culminated a series of orders in which the Board reexamined and required ATC to modify its rules concerning travel agent defaults and an agent's liability for lost or stolen tickets. The re-examination was made at the request of the Popular Latin Travel Agency.

e. By Order 80-6-64, August 12, 1980, the Board withdrew its approval, at ASTA's request, of ATC agreements requiring substantial personal guarantees from new agency applicants, agents in default and purchasers of already accredited agents.

f. By Order 80-12-157, December 31, 1980 the Board granted a travel agent's request for reconsideration of its approval of an IATA agreement which prohibited travel agents from splitting commissions with outside sales representatives.

g. By Order 81-8-31, August 6, 1981 the Board granted the motion of a travel agency to withdraw its request that the provision of the ATC agreements prohibiting rebating be disapproved. The request was prompted by the disapproval by the ATC Travel Agent Commissioner of the agents proposed free parking and shuttle service as an unlawful rebate. The agent withdrew its request when the Commissioner's decision was overturned in arbitration.

h. By Order 81-6-143, the Board approved an amendment to ATC's rules involving the restitution of commissions. The amendment was submitted after Intertours of America, a travel agent, had petitioned the Board to withdraw its approval of the prior rules because they were procedurally unfair.

i. Order 80-7-35, July 8, 1980, was the culmination of a series of orders which re-examined and required ATC to modify its rules concerning the posting of bonds as a condition to appeal of adverse decisions by the Travel Agent Commissioner. The re-examination was made at the request of Koener-Liberman Travel.

j. Order 83-4-32, April 7, 1983 the Board proposed to remove antitrust immunity from the ATC agreements that govern the operation of Scheduled Air Traffic Offices. In comments filed with the Board ARTA and other travel agent groups have indicated that such action is desirable in order that they may compete for government travel dollars.

STATE LAWS AFFECTING TRAVEL AGENTS

Appendix C

Seven states have laws currently in effect that govern the promotion or sale of travel-related services. But only four states: Delaware, Hawaii, Rhode Island and New York, directly regulate the business activity of carrier appointed travel agents. Both Hawaii and New York exclude air carriers from their definition of travel promoter. The California and Ohio statutes specifically do not apply to either air carriers or carrier appointed agents. The seventh state, Arkansas, does not regulate air travel services.

A brief description of these statutes follows:

1. Delaware - Title 30 §2301(80) of the Delaware Code imposes an annual license fee of $150 on each travel agency and an additional $10 fee on each separate agency branch or location. Any person who operates a full service travel bureau which assists in the planning and acquisition of tickets for any mode of travel is considered a travel agency.

2. Hawaii - Chapter 468K of the Hawaii Statutes governs travel agencies, defined as intermediaries between a person seeking to purchase travel services and a person seeking to sell them. It does not apply to air carriers. Chapter 468K requires travel agents to register with the state and contribute to a recovery fund established for the purpose of paying actual damages suffered by customers as a result of misrepresentations or other misconduct by travel agents.

3. Rhode Island - Sections 5-52-1 through 5-52-14 of the Rhode Island Code govern the activities of any person who arranges travel for a fee. It imposes comprehensive license qualifications, bonding and refund requirements on travel agents. Section 5-52-10 contemplates the existence of a fiduciary relationship between the travel agency and its customers. It provides for the automatic revocation of a travel agency's license in the event that relationship is breached.

4. New York - Article 10A, Sections 155-159a of New York's General Business Law prohibits misrepresentation in the sale of travel services by persons other than common carriers.

5. California - Article 2.5, sections 17540-17540.13 of California's Business and Professions Code imposes bonding and refund requirements to protect the public from the consequences of mispresentation and sudden cancellations by travel promoters. The law does not apply to air carriers or carrier appointed travel agents and is directed primarily at charter activity.

6. Ohio - Section 1333.96 of the Ohio Code imposes registration and bonding requirements on travel promoters other than commercial air carriers or IATA or ATC agents.

7. Arkansas - Section 84-2214 of the Arkansas Code regulates travel services operated for the limited purpose of arranging automobile transportation on a shared cost basis. It does not generally regulate travel agencies or the sale of air transportation.

Sales Talk

A column devoted to reflections of travel agent life—a small quiet corner where one can think about the ironies of the job—those helpless moments when all you can do is laugh—and the rewarding times when you feel you've really helped a client to get there better, which, after all, is what this business is all about and is the key to survival.

THE DAY EXCLUSIVITY DIED

by Emily Brown,
CTC

I'VE BEEN thinking about opening a lemonade stand. Let me explain why.

The week the CAB decision in the Competitive Marketing Investigation put an end to travel agent exclusivity was a bleak one here. The phones were busy all over town with agents calling one another asking "how do you feel about it?" and "what do you think it will mean for us?"

We were scared. Oh, I could put it in more roundabout ways, but the bottom line is that we were scared. For several reasons. Not the least of which was that ominous, ever scary bugaboo: the unknown. Some unknown people, collectively called the CAB, had decided to change our lives. Zap. It caught us by surprise.

Somehow, I had thought the Board would go along with Judge Yoder's recommendation to retain travel agent exclusivity. I sat in my office and looked around and wondered about the future of my business. And myself.

I decided that since the decision caught me off-guard, I had now better make it my business to find out what the ruling actually meant. Not just the panic.

I read volumes. And I ended up very confused. Some reports made it sound like every gas station and grocery store would be selling airline tickets. Some made it sound like nothing was going to change at all. The more I read, the less I knew.

I felt I needed to talk to somebody who knew and understood this thing. Someone who didn't embellish on the bare bones of it. Just the facts, ma'am.

It was suggested that the nearest thing to the Oracle of Delphi in this CAB decision was a woman named Susan Jollie, the associate CAB general counsel. Fate intervened at this point. Jollie lives in Washington, D.C., and I was scheduled to be there to attend classes at George Washington University. So when I got there, I called her.

Jollie said that, in her view, it was not a "horribly revolutionary decision," but rather one of clarifying the antitrust theory of competition. Luckily I am taking a course this semester in economics, and so I later looked up "antitrust" in my textbook. (I mean it isn't a word I use every day, how about you?)

The following is a quote from *The Economic Problem* by Heilbroner and Thurow explaining antitrust:

"Only a few decades ago, there was virtually unanimous agreement among economists that a strict application of antitrust laws was one of the most effective remedies for the problems of oligopolies (control by a few). Today this zeal is on the wane.

"Why has the zeal for antitrust declined? There are a number of reasons. One is that economists have come to recognize that an industry with one or two giants and a tail of small firms does not operate differently than does an industry with five or six leading members. The struggle for market shares goes on.

"Economists have also begun to pay attention to the fact that industries dominated by big firms have the ability to create technical advances. Competitive firms may be more efficient at any moment selling their output at lower prices, but oligopolistic industries have been the innovators.

"The defenders of antitrust do not want to give up the implicit threat that antitrust prosecution carries. The ghost of antitrust serves to prevent the rise of supergiant firms whose political and social power might be considered inimical to our democracy, if not injurious to our economy."

With the basics of the situation under my belt, I asked some "what does it mean for the travel agent industry" questions.

Jollie said it was her feeling that the largest body of knowledge in the travel industry lay with the travel agents and that because of this, travel agents were in a position to be the most innovative. Since the decision was designed to encourage innovation, it would seem to follow that when the dust settled, travel agents could emerge as the innovators of travel marketing.

She also indicated it would be necessary for the agent industry to see that we are allowed to compete fairly. That in two years' time we should be ready to move against any unreasonable restraint placed upon our freedom to compete by the carriers, like the ban against agents placing unattended ticketing machines on customer premises.

Jollie also indicated that the carriers would have no reason to encourage the issuance of improperly prepared documents and that the likelihood of tickets being issued by the gas station attendant while your tank was being filled was rather far-fetched. Specialized ticket vendors, however, are almost a certainty.

In short, she viewed the decision as one which provided an opportunity for innovation.

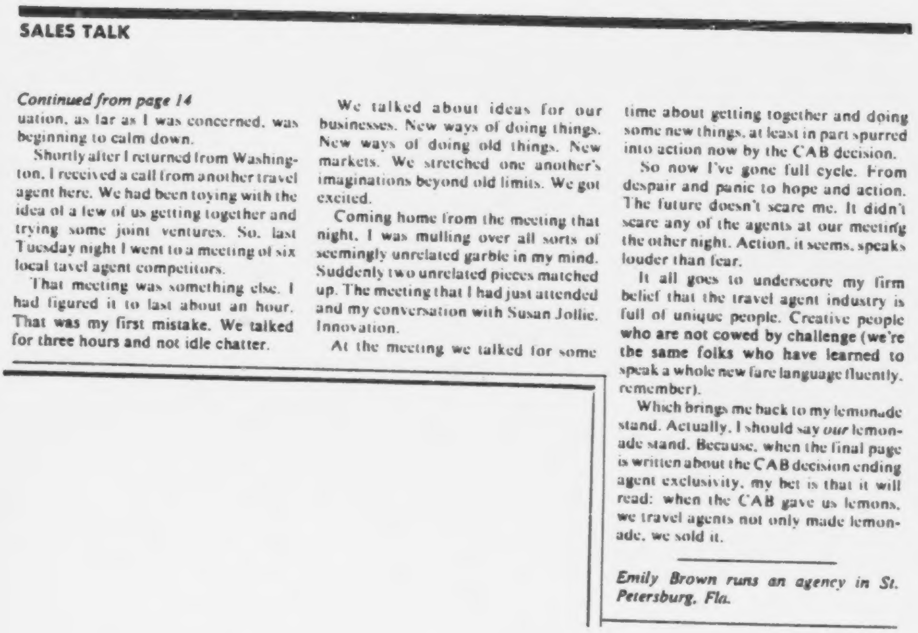
When I hung up the phone, I felt much better. Maybe because I wasn't dealing with so many unknowns anymore. The problems were just the same, but they weren't so big.

I didn't feel scared anymore; I felt challenged to be creative. To be on a creative alert. As far as I'm concerned, there are a lot worse assignments than that.

In the meantime, I heard from my office that Eastern, TWA and United had formally reaffirmed their commitment to continuing the cooperative relations they have enjoyed with travel agents for the past 40 years. The sit-

Continued on page 18

Appendix D



SALES TALK

Continued from page 14

uation, as far as I was concerned, was beginning to calm down.

Shortly after I returned from Washington, I received a call from another travel agent here. We had been toying with the idea of a few of us getting together and trying some joint ventures. So, last Tuesday night I went to a meeting of six local tavel agent competitors.

That meeting was something else. I had figured it to last about an hour. That was my first mistake. We talked for three hours and not idle chatter.

We talked about ideas for our businesses. New ways of doing things. New ways of doing old things. New markets. We stretched one another's imaginations beyond old limits. We got excited.

Coming home from the meeting that night, I was mulling over all sorts of seemingly unrelated garble in my mind. Suddenly two unrelated pieces matched up. The meeting that I had just attended and my conversation with Susan Jollie. Innovation.

At the meeting we talked for some time about getting together and doing some new things, at least in part spurred into action now by the CAB decision.

So now I've gone full cycle. From despair and panic to hope and action. The future doesn't scare me. It didn't scare any of the agents at our meeting the other night. Action, it seems, speaks louder than fear.

It all goes to underscore my firm belief that the travel agent industry is full of unique people. Creative people who are not cowed by challenge (we're the same folks who have learned to speak a whole new fare language fluently, remember).

Which brings me back to my lemonade stand. Actually, I should say *our* lemonade stand. Because, when the final page is written about the CAB decision ending agent exclusivity, my bet is that it will read: when the CAB gave us lemons, we travel agents not only made lemonade, we sold it.

Emily Brown runs an agency in St. Petersburg, Fla.

Appendix E

ASTA
American Society of Travel Agents, Inc.
711 Fifth Avenue, New York, N.Y. 10022 • Tel. (212) 486-0700

INTRA-SOCIETY CORRESPONDENCE

To: EXECUTIVE COMMITTEE

Re: Options Regarding ATC's Uniform Agency Program

From: Richard P. Ramaglia
Executive Vice President

Date: April 9, 1979

From much of what has been said and observed in recent months, it seems clear that a major goal of the CAB is to deregulate the retail travel agency industry, in part to bring about public benefits in the area of retail price competition.

Existing ATC travel agent resolutions will shortly be coming under close scrutiny by the CAB to determine if these arrangements meet the Board's revised antitrust immunity requirements, namely:

1) Do they serve an overwhelming public need?

2) Can the effects or benefits to be derived from such agreements be achieved in some alternative way?

While no one can predict with certainty every aspect of the existing ATC agency resolutions that will be maintained, modified, or eliminated, it appears reasonable that we can assume that those regulations which are highly restrictive and anti-competitive and without substantial public benefit will be the first to be modified or eliminated. We can anticipate that commissions will be deregulated. Appointment and retention standards will be closely scrutinized. Agreements restricting advertising and promotion by air carriers with travel agents will be eliminated, and the Board may be ultimately seeking a method of making legal the discounting or rebating of air fares or other forms of retail price competition.

While much of the above initially sounds unacceptable to the industry as it is currently structured, ASTA will have to weigh all options very carefully before adopting a final position. We should and must first consider if there is a way to provide one or more of the CAB objectives in a way that is the least disruptive to the travel agent industry; in particular, if some changes would, at the same time, provide opportunities for the retail travel agency industry. For example, we all know that the current method of agency appointment under the control of ATC has provided some benefits in the form of standard ticketing and accounting practices, interline arrangements, etc. However, at the same time, ATC's dictatorial position in regulating the travel agency industry has prevented the retail travel agent from operating as a totally independent entrepreneur. The travel agent's commission levels have been fixed without regard to rising costs. His financial reporting and remittance requirements have been increased, adversely affecting his cash flow. He has been treated tantamount to a public enemy for such minor conference infractions as reporting tickets out of sequence or for late remittances or for bank errors regarding his deposits. Similarly, credit and bonding requirements have become increasingly stringent in spite of the fact that the agency industry has maintained a better financial history than the airlines themselves.

The list is virtually endless, but I have tried to highlight a few of the more significant problems that the retail agent faces as a result of doing business under the monopolistic control of a conference system. The control has only been achieved through historic antitrust immunity which has not or will not be granted to any other industry.

We must ask ourselves what the travel agency industry would be like in the absence of such uniform rules, regulations, and procedures. While it is certainly true that the industry has grown in number and market share, is it possible for us to determine how much greater growth or share of market the industry would experience in the absence of conference regulation. While it is true that the industry has grown in size, it is regrettably also true that the industry has not grown in profitability. Would we be better served in an environment that requires carriers to individually determine what business requirements they would expect of those wishing to be travel agents and what compensation levels they would pay? Would we be better served if carriers were to individually determine their policies and penalties regarding reporting and remittance? I am sure we can all see some tempting potential benefits and, at the same time, some risks.

Some may view deregulation as a threat, others may view it as opportunity. For certain, these changes, at a minimum, will initially bring about confusion, complexity, and administrative burdens. Can the confusion, complexity, and administrative burden be minimized in time and with adjustments? The new methods of doing business and the potential financial benefits of individually established commision levels and bonus or override compensation arrangements may provide an agent with the needed revenue to more professionally and productively conduct his or her independent business.

For certain, with these changes, the travel agency industry would no longer have its uniform image. One could anticipate a much greater degree of specialization. Some would perform as professional travel consellors or consultants at a high knowledge and service level, while others would function as volume distributors of tickets and minimum knowledge or service would be available, and others may well concentrate their specialties on commercial travel or other facets of our business such as cruises, groups, etc. Is this substantially different from what we have today without the necessary and appropriate recognition of a changing industry? Is it right to expect that all travel agencies must be full-service travel outlets or can, indeed, the public and the industry benefit by more distinct identification of these specialty travel outlets. This would allow the public to choose and select, based on their needs, the type of firm which best serves their need. At the same time each agent, as an independent entrepreneur, would have the right and freedom to determine which business specialty best serves his capabilities and market, and enhance his profitability potential.

These are but a few of the provocative questions we must focus on before finalizing ASTA policy.

Dick

Source: ASTA-IR-17
Pages 1-3
Docket 36595

RPR/vg

Excerpt from Memorandum Prepared
by ASTA Washington Office re
Airline Regulatory Reform
June 8, 1978

Appendix F

[at 3-4]

INTERCARRIER AGREEMENTS - SECTION 412

ASTA believes section 412 should be amended to sharply limit the Board's authority to approve agreements that are anticompetitive in nature --agreement which fix travel agent compensation, control levels of capacity, equipment or schedules, or which relate to the pooling of earnings, losses, traffic or service, or which fix other rates, fares or charges. For example, IATA, on an experimental basis for the past 3 years, has allowed open commissions which has proven to be successful and undamaging to the airline industry. On June 8th, after lengthly hearings on this issue, the CAB instructed the agency staff to draft an order rejecting an agreement setting travel-agent commissions paid by members of the International Air Transport Association. The Board indicated that it's inclined to encourage this competitive "open rate" activity, which has been urged by the Justice Department. ASTA supports this decision and feels that open rate commissions should be extended to domestic air transportation as well.

However, agreements among carriers that are not inherently anti-competitive, but rather establish, for the convenience of the traveling public, essential and efficient industry programs should be permitted as the public interest warrants. Included among such convenience-oriented agreements are standard ticketing and ticket stock, interline air connections and common baggage handling procedures.

The House draft revision of Section 412 differs in some respects from the version advanced in the Senate bill. In that latter bill, the new standard for review of agreements would be applicable to interstates and overseas air transportation only; the language of current law would be retained for agreements involving foreign carriers. The House bill, on the other hand, establishes one test applicable to all types of transportation. ASTA believes this approach is preferable; the same standard should be applied to agreements affecting foreign, interstate and overseas transportation.

The Senate bill, however, includes two provisions not contained in the House draft that ASTA recommends be incorporated in the final revision of Section 412: (1) the eventual expiration of currently existing agreements unless specifically reapproved by the CAB; and (2) the 5 year limitation on the life of agreements with anti-competitive effects that receive CAB approval.

Source: ASTA-IR-24
Page 117
Docket 36595.

Appendix G

OFFICE OF
TRAVEL AGENT COMMISSIONER
WASHINGTON, D. C.

Request for Review :
:
SPORTSMAN'S TRAVEL AGENCY, INC. :

Docket 83-45A
Casselberry, Florida

O R D E R

This proceeding involves a request for review by Sportsman's Travel Agency, Inc. (Sportsman's) of the action of the Air Traffic Conference (ATC) in disapproving its application for accreditation as an ATC agent. The application was disapproved by letter dated March 31, 1983, on the ground that Sportsman's manager, upon whom the applicant relies to meet the ticketing experience requirement for accreditation set forth in Section IV.B.4. of Resolution 90.3, the ATC Passenger Sales Agency Agreement (Agreement), does not have the prescribed experience.

A hearing has been held, and this proceeding stands submitted for decision.

Section IV.B.4. requires an applicant to submit evidence that the owner, partner, an officer, the manager, or another full time employee of the applicant staffing the location for which the application is intended

> has had, within the past three years, one year's experience in airline passenger ticketing in the full-time employment of either an ATA or IATA member airline; or a travel agency included on the ATC or IATA Agency Lists. One year's experience in an ATA or IATA member airline or a travel agency included on the ATC or IATA Agency List working with automated ticketing equipment will meet this requirement. Any tenure of service with one employer for less than six months will not be considered towards meeting this requirement. (Emphasis supplied)

The issue presented in this case is whether the ticketing experience of Sportsman's manager during the period October, 1980 to January, 1982 was gained while she was in the full-time employment of a travel agent included on the ATC Agency List. Sportsman's contends that its manager's ticketing experience during the above period at an in-plant branch location included on the ATC Agency List satisfies the Section IV.B.4. requirement for accreditation. ATC contends that Sportsman's manager was employed by the customer on whose premises the in-plant was located, not by the agent, and that, accordingly, she does not have the requisite ticketing experience.

Appendix G

At the hearing in this proceeding, Sportsman's manager (hereinafter referred to as the manager) testified that on July 29, 1979, after leaving the employment of a travel agency, she joined Pratt & Whitney Aircraft (P & W). She had been interviewed by the P & W travel department on July 12, 1979 and was hired by one of the individuals who conducted the interview. According to a copy of a "Salary Job Description" from P & W included in the record, the manager's job title at P & W was "Clerk, Passenger Reservations." At the time of the interview with, hiring by, and commencement of employment with P & W, no relationship existed between Travel & Tour Services, Inc. d/b/a Wm. J. Kenney Travel and Tours Company (Kenney), an ATC-accredited agent, and P & W. The manager testified that such a relationship began three days after the start of her employment with P & W. On October 2, 1980, an in-plant location of Kenney at P & W was included on the ATC Agency List.

The manager's duties at the P & W in-plant included making air, car, and hotel reservations and airline ticketing, among other responsibilities. The manager testified that the in-plant branch at P & W is wholly owned by Kenney, that the in-plant personnel were advised by the Kenney home office concerning operating procedures, and that Kenney had the final say over who would work in the in-plant. While the manager stated that her paychecks were drawn on a P & W account, her fringe benefits came from P & W, and her W-2 forms were issued by P & W, she also testified that Kenney reimbursed P & W for the services performed by in-plant personnel, and that the existence of a reimbursement arrangement was confirmed to her orally by Kenney and in writing by P & W. 1/

Because the manager's activities at the P & W in-plant were directed by Kenney, Kenney had the final say over who would work at the in-plant, and there was an employee cost-sharing arrangement between Kenney and P & W, Sportsman's contends that its manager was an employee of Kenney and that, accordingly, her experience at the P & W in-plant branch of Kenney, from the time of its inclusion on the Agency List until her resignation, constitutes qualifying experience under Section IV.B.4.

The record does not support Sportsman's position; rather, it compels the finding that the manager, while working at the P & W in-plant, was an employee of P & W, not of Kenney. As such, she fails to meet the requirement set forth in Section IV.B.4. that she have had at least one year's ticketing experience within the past three years while in the full-time employment of an agent included on the Agency List. The issue in this case is not whether the manager has the ability to perform the ticketing function, but rather whether her experience satisfies the particular requirement set forth in Section IV.B.4. 2/ Since the manager, the person upon whom the applicant relies to satisfy the ticketing requirement, does not meet that requirement, Sportsman's application must be disapproved.

1/ A letter from P & W's Manager, Personnel Support, dated May 6, 1983, states that the manager was employed by P & W from July, 1979 to November, 1981 and confirms that beginning in October, 1980 there was a "cost sharing customer-agent in-plant" agreement between Kenney and P & W.

2/ See Contact Travel, Inc., Docket 82-84A, June 10, 1982.

The manager herself testified that she was hired by P & W, and nothing in the record suggests that at any point during the period under consideration herein she ceased to be a P & W employee and, instead, became a full-time Kenney employee. Indeed, the record shows the contrary. The letter from P & W 3/ upon which Sportsman's relies to verify the existence of a cost-sharing relationship between P & W and Kenney also states that "you /the manager/ were employed by Pratt & Whitney Aircraft in West Palm Beach, Florida, from July 1979 to November 1981 as a Clerk, Passenger Reservations." Additionally, a letter dated February 8, 1983 submitted by the applicant from Kenney's Regional Manager states "/t/his is to verify that /Sportsman's manager/ was employed full-time at our in-plant location at Pratt & Whitney Aircraft, W. Palm Beach, prior to the time we acquired same in October 1980, until her terminating in January 1982." While the above letter verifies the manager's employment at the in-plant, it does not state that she was an employee of Kenney, and it indicates that the manager's employment at P & W antedated the existence of the Kenney in-plant. Furthermore, the factors relied upon by Sportsman's as evidence of its manager's employment by Kenney rather than by P & W - the in-plant is wholly owned by Kenney; Kenney advised in-plant personnel concerning operating procedures; Kenney had the final say over in-plant personnel; and Kenney reimbursed P & W for services performed by in-plant personnel - do not establish that the manager was employed by Kenney. The above factors merely constitute either requirements imposed upon in-plant locations or practices permitted at in-plant locations. 4/

The record clearly establishes that the manager, although working at the Kenney in-plant, was an employee of P & W. She was hired by P & W, and the hiring took place prior to the time any relationship existed between Kenney and P & W; she was paid by and received her fringe benefits and her W-2 forms from P & W. Additionally, in his letter acknowledging the existence of an employee cost-sharing arrangement with Kenney, the P & W Manager, Personnel Support indicates that the manager was employed by P & W, with the same job title she had at the time of initial hiring, until her resignation in November, 1981. Finally, Kenney has not stated that the manager was a Kenney employee, but merely that she worked at the Kenney in-plant at P & W.

In view of the foregoing, it is found that the applicant has not established that it has personnel meeting the ticketing experience requirement of Section IV.B.4. of the Agreement, and the application will, therefore, be disapproved. This action is, of course, without prejudice to the right of this applicant to reapply for accreditation when it is able to demonstrate that it meets all applicable standards.

3/ See Note 1, supra.

4/ An in-plant branch must be wholly owned by an ATC-accredited agent. Sections IV.D.4. and XVI.A. of the Agreement. See also Section 60, p. 5, Attachment B, Travel Agents Handbook. It is required that the home office have responsibility for, among other things, the staff of its branches. Section IV.D.4. of the Agreement. Section XVI.G.1. requires that the agent operating an in-plant "have complete discretion to reject in good faith any employee offered by the customer." And, finally, reimbursement for salaries of customer personnel working at the in-plant is permitted. See Section XVI.G. of the Agreement and Section 60, pp. 5, 7-8, Attachment B of the Travel Agents Handbook.

ACCORDINGLY, IT IS ORDERED THAT:

1. The application of Sportsman's Travel Agency, Inc. for accreditation is disapproved;

2. In accordance with the provisions of Rule 29, this order shall be made available to the public and become public information five days after the date of entry; and

3. Within 30 days after receipt of this decision Sportsman's may seek review thereof by an arbitral tribunal by following the procedure outlined in the Commissioner Resolution (Resolution 90.4, Section XIII.).

Entered at Washington, D. C., this 9th day of June, 1983.

Robert L. Park

Robert L. Park
Travel Agent Commissioner

Air Traffic Conference of America

TRADE PRACTICE MANUAL

RESOLUTION 5.65
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EFFECTIVE 12/4/81

INTERLINE TRAFFIC AGREEMENT - PASSENGER

Whereas the parties hereto mutually desire to agree upon the terms and conditions relating to the handling and sale of tickets, or miscellaneous charges orders therefore, for transportation by air over their respective lines, and

Whereas the parties hereto mutually desire to agree upon the terms and conditions relating to the handling of interline baggage;

Now therefore, in consideration of the mutual covenant of parties hereto, it is agreed as follows:

I. Application to Become a Party Hereto

A. Any certificated scheduled airline; scheduled airline, which is a holder of a foreign air carrier permit; or any commuter airline may become a party to the Agreement with the procedures set forth in this section.

B. An intrastate airline operator holding a commercial operator's certificate issued pursuant to Part 121 of the Federal Aviation Regulations and holding a certificate of public convenience and necessity, or other license, from the appropriate state authority permitting it to engage in intrastate air transportation, may become a party to this Agreement in accordance with the procedures set forth in this section.

C. Any airline qualified to be a party to this Agreement and desiring to do so shall make a written application to the Executive Secretary of the Air Traffic Conference of America. In addition, the applicant must also provide two copies of the following:

1. Operating authority documentation, including a completed copy of CAB Form 298-A showing CAB approval stamp if the applicant is a commuter air carrier.

2. Current balance sheet of the applicant, either prepared or certified by an independent accountant.

3. Statement of limitation of baggage liability.

4. Voided sample of the baggage tag the applicant intends to use for interline transportation as well as any other document such as tickets or MCOs that applicant intends to use.

5. List of cities served.

D. An intrastate carrier must additionally provide the following:

1. A copy of the state issued certificate of public convenience and necessity or other license.

2. An Agreement that the applicant will not use the provisions, terms, and conditions of this Agreement to violate any applicable Federal or State laws.

E. All applications must be accompanied by an application processing fee to defray administration and handling costs.

F. Upon receiving the above stated items, the Executive Secretary shall cause to be mailed to each of the parties hereto a notice in writing of such application. After receipt of such notice, each party hereto may, by notice in writing mailed to the Executive Secretary, either concur in or dissent from such application. Upon the prior execution of a counterpart hereof by the applicant, the Executive Secretary shall, 30 days after the date of mailing of the notice of such application, cause to be mailed to each of the parties hereto and to the applicant a notice in writing of the parties hereto who have concurred in such application. The Agreement shall become binding, between the applicant and all of the parties hereto who have concurred in such application, ten days after the date of mailing such latter notice. 2/

G. In the event any party hereto provides the Executive Secretary with a notice of concurrence with any other party hereto subsequent to the previously mentioned 30 day period following application, such concurrence shall become binding on the date of mailing such notice.

H. All non-certificated parties hereto shall, each year, on the anniversary of the effectiveness date of their becoming a party to the Agreement, provide the Executive Secretary with an updated, written statement of their operational and financial status. Failure to provide such notice within 60 days after the subject date shall result in the presumption that the carrier is no longer in operation and shall be construed as a voluntary withdrawal from the Agreement. 3/

c II. Annual Fee

Non ATC parties hereto agree to pay an annual subscription fee. This amount is to cover administrative expenses.

cIII. Definitions

A. "Baggage" means the property, as defined in applicable tariffs, of a passenger carried in connection with the trip for which the passenger has purchased a ticket, and which has been checked in accordance with the rules and regulations of applicable tariffs.

B. "Carrying Airline" means a party hereto over whose lines a passenger and his baggage is transported or is to be transported pursuant to an interline ticket.

C. "Final Party" means the party which is in control of a mishandled bag at the passenger's final destination.

D. "Forwarding Party" means the party hereto which prepares a mishandled bag for forwarding to the passenger's final destination.

E. "Interline Baggage Tag" means the tag form currently approved by the Air Traffic Conference of America for interline use, and issued by the originating carrier for the identification of through-checked interline baggage.

F. "Interline Ticket" means the forms currently approved by the Air Traffic Conference of America for Interline use, and issued to the passenger(s) by a party hereto, valid for revenue transportation over the lines of one or more such parties.

G. "Issuing Airline" means a party hereto which sells or issues an interline ticket or miscellaneous charges order to a passenger.

H. "Miscellaneous Charges Order" means the form currently approved by the Air Traffic Conference of America, issued by a party hereto, which provides for the issuance of a ticket(s) in exchange for such order.

I. "Originating Airline" means a party hereto which carries a passenger and his baggage over its lines from the point of origin, or from a stopover point, to the first point of connection for such passenger and baggage with another party.

J. "Tariff" means the published fares, charges, and/or related conditions of carriage.

¢ IV. Issuing Interline Tickets and Miscellaneous Charges Orders

A. Each party hereto may issue interline tickets calling for transportation over the lines of any of the other parties hereto or miscellaneous charges orders calling for transportation over the lines of any other party hereto. No interline tickets or miscellaneous charges orders shall be issued calling for space on a particular flight unless such space has previously been assigned to the issuing airline by the carrying airline and has not been sold by the issuing airline or revoked by the carrying airline prior thereto or unless the issuing airline communicates with the carrying airline and obtains the necessary reservation for space. Interline tickets or miscellaneous charges orders shall be sold only at the rates contained in the applicable tariffs and in other respects in accordance with such tariffs.

In the issuance of interline tickets, such standard ticket formats shall be used as may be adopted from time to time by the Air Traffic Conference of America provided, however, that separate ticketing arrangements may be made by two or more parties for use over their own lines only.

¢ V. Honoring Interline Tickets or Miscellaneous Charges Orders

A. Each party hereto agrees to honor for transportation over its lines interline tickets issued by any other party hereto and calling for such transportation, and each party hereto agrees to issue tickets in exchange for miscellaneous charges orders issued by any other party hereto and calling for transportation over lines of such party, provided that such interline tickets or miscellaneous charges orders have been issued in accordance with Paragraph III hereof.

¢ VI. Responsibility of Issuing Airlines

A. In selling tickets or miscellaneous charges orders for transportation over the lines of another party, the issuing airline, as between it and the purchaser, acts only as agent of the carrying airline or airlines, and any injury to or death of a passenger, or any loss of or damage to baggage, caused by or occuring on or in connection with the premises or airplane or other mode of vehicle of conveyance of a carrying airline for whose account such ticket or exchange order was properly issued (and not involving the operations of the issuing airline) shall not be the responsibility of the issuing airline. Each carrying airline indemnifies and agrees to hold harmless each issuing airline (issuing airline as used in this paragraph to

¢ VI. (cont'd)

include officers, agents or servants thereof) from any and all such claims whether valid or not, made against such issuing airlines by or on behalf of all persons to whom such issuing airlines have sold tickets or miscellaneous charges orders for transportation over the lines of such carrying airline. In the event any such claims or suits on such claims should be brought against the issuing airline or claim made against it, it shall promptly notify the carrying airline involved, by giving written notice to such carrying airline, whereupon such carrying airline shall, at its own cost and expense, undertake the defense of such suit or settlement of such claim and pay the amount of any final judgment, decree entered against the issuing airline or any settlement negotiated by the carrying airline. The issuing airline agrees to cooperate with the carrying airline by promptly furnishing to the carrying airline at its request all data, papers, records and information within the possession or knowledge of the issuing airline material to the resistance or defense against any such suit or claim.

B. The issuing airline shall be responsible to the carrying airline for the proper collection of tariff fares and charges (except excess baggage charges when the issuing airline is not the originating airline) on applicable forms such as United States Government travel orders and Universal Air Travel Plan transportation receipts, and for the issuing of proper tickets and miscellaneous charges orders. Each issuing airline indemnifies and agrees to hold harmless each party ("other party" as used in this paragraph to include officers, agents or servants thereof) from any and all claims whether valid or not, made against such other party by or on behalf of any and all persons to whom the issuing airline has issued a ticket or tickets, or a miscellaneous charges order or miscellaneous charges orders for transportation over the lines of such other party to the wrong destination or to whom the issuing airline has issued an otherwise improper ticket or tickets, or miscellaneous charges order or miscellaneous charges orders. In the event such other party should be sued or a claim be made against it (where said claims are based on damages alleged to have been caused by said erroneous or improper issuance of tickets or exchange orders) it shall promptly notify the issuing airline involved by giving written notice to such issuing airline, whereupon such issuing airline shall, at its own cost and expense, undertake the defense of such suit or settlement of such claim and pay the amount of any final judgment, decree entered against such other party, or any settlement negotiated jointly by such other party and issuing airline. Such other party agrees to cooperate with the issuing airline by promptly furnishing to the issuing airline at its request all data, papers, records and information within the possession or knowledge of such other party material to the resistance or defense against such suit or claim. The carrying airline will render all reasonable assistance to the issuing airline in collecting proper fares and charges.

¢VII. Representations by Parties

A. Each party hereto agrees not to make any representations with regard to the tickets or miscellaneous charges orders of other parties hereto or the flight or journey for which the same shall be sold or issued, except those representations specifically authorized by such other party.

B. No party hereto is authorized to admit, accept or receive service of summons or other process on behalf of any other party hereto. Service of legal process upon a party on behalf of any other party is therefore invalid and without any legal effect whatsoever.

XVIII. Checking Interline Baggage

A. One interline baggage tag is to be affixed to each piece of checked baggage only by an authorized employee (or carrier authorized persons) of the originating member.

B. Baggage of an interline passenger ticketed for continuous connecting passage on the lines of two or more parties, hereto, shall be checked through to the final destination on the lines of any participating carrier or to the first stop-over point, if any stop-over point is involved, on the flight requested by the passenger and indicated on his ticket, even though all requested space has not been confirmed at the time of passenger's departure from the origin station, except that, baggage of interline passengers shall not be checked beyond the city to which excess baggage or excess valuation charges, if any, have been collected. No party shall accept a passenger's baggage for interline checking unless the passenger's name is on the outside of such baggage. Parties shall make baggage identification labels available, at no cost, to passengers.

C. In the event that an interline passenger demands access to his baggage and releases his bagge check at any airline scheduled stop prior to his final destination, such action shall require the rechecking of such baggage and if the passenger increases the weight or valuation of this baggage at such time, any excess baggage or excess valuation charges which may be involved shall be collected by the carrying airline first transporting the passenger after such increase in weight or valuation.

D. Because of:

- Restrictions on the carrying of any live animals in the cargo or baggage compartments of certain aircraft types,
- Occasional necessity to leave live animals behind because of a limit on the number of animals which may be carried on certain aircraft types,
- The inability of carriers to guarantee that they will be able to accept an animal on the same flight with the passenger,

no member party to this agreement shall check live animals as interline baggage except when said animals are checked through on an interchange flight and checked to a city served by that interchange flight.

E. Because of:

- Individual carrier acceptance restrictions/limitations/inspection requirements,
- The requirements pertaining to notification of pilot-in-command,

no party to this agreement shall check baggage containing restricted articles as interline baggage.

¢ F. Because of individual carrier acceptance restrictions, inspections, and declaration requirements, no member party to this agreement knowingly shall check baggage containing firearms as interline baggage unless such baggage conforms to the receiving party's rules provided in appropriate tariffs.

IX. Interline Baggage Tag

Each party hereto shall issue in connection with the checking of interline baggage such standard interline baggage tag as may be adopted from time to time by the Air Traffic Conference of America.

X. Accepting Interline Baggage

A. Each party hereto agrees to accept and transport over its lines all baggage of interline passengers traveling over its lines, bearing interline baggage transfer tags calling for such transportation, issued by any other party hereto in accordance with Paragraphs VIII and IX hereof.

B. Each party hereto agrees to assume responsibility for establishing procedures for tracing interline mishandled baggage and for the expedient processing and settlement of claims, in accordance with Section IX, B.1 below, up to the maximum liability of each party to this agreement. Each party must furnish to the Executive Secretary of the Air Traffic Conference its maximum baggage limitation of liability (excluding excess valuation) per fare paying passenger for on-line transportation, which shall be published in Exhibit "A" hereto.

Each party to this agreement agrees to assume responsibility for maintaining proper and accurate transfer records for the purpose of tracing interline mishandled baggage. Also, each party to this agreement, agrees to expedite and deliver delayed mishandled baggage in accordance with Section X. B.2.a. below.

1. Settlement of Baggage Claims

Claims resulting from loss of, damage to, delay of, pilferage, or theft of checked baggage transported by one or more carriers shall be handled by the carrier to which the customer presents the preliminary notice. Such carrier will, after assuring itself of the validity of such claim, and having completed a reasonable search for lost or mishandled bag(s), pay the customer the appropriate amount due on behalf of all participating carriers. Thereafter, a diligent effort shall be made among the carriers involved to determine individual carrier responsibility for the claim. If it is not possible to determine such responsibility, the claim participating carrier shall settle the claim amongst themselves on an automatic prorate basis pursuant to the provisions outlined below.

I. DEFINITIONS

The following are definitions and explanations of terms used for the purpose of this Resolution:

1. AUTOMATIC PRORATE - A procedure by which each claim participating carrier assumes a proportion of the claim payment based on the prescribed formula in Section II, paragraph 2.

2. CHECK BAGGAGE - Baggage placed in the care and custody of a carrier for which that carrier has issued a baggage tag.

3. PRELIMINARY NOTICE - Notification by the passenger that his baggage has been lost, damaged, delayed, pilfered, or stolen. This may originate in the form of a report prepared on his behalf by airline personnel or a written document from the passenger.

4. CLAIM - A written demand for compensation prepared and signed by the passenger containing an itemized listing and value of goods for which compensation is being requested.

5. CLAIM PARTICIPATING CARRIER - A carrier(s) that is indicated on the baggage tag and will have a monetary involvement in any claim payment.

6. CLAIM RECEIVER - The carrier to whom the passenger originally files his report of lost, damaged, delayed, pilfered, or stolen baggage.

7. CONNECTING POINT - An agreed to break(s) in a passenger's continuous journey at a point(s) between the place of departure and the place of destination at which the passenger changes carriers and through which his baggage had been checked.

8. BAGGAGE TAG - A document issued by a carrier to a passenger to identify that passenger's checked baggage.

9. PASSENGER - A person to whom a ticket covering through transportation over the services of two or more carriers has been issued.

10. REVENUE PARTICIPATING CARRIER - A carrier involved in a claim in which that carrier received revenue from the carriage of the passenger.

II. PROCEDURES FOR THE SETTLEMENT OF LOST CHECKED BAGGAGE AND THE APPORTIONMENT OF PAYMENT

Except where there is mutually known responsibility of one of the participating or intended carriers, claims in respect to interline carriage by two or more carriers will be settled in accordance with the following rules.

1. All interline billings shall be paid or questioned within sixty (60) days from the date of the receipt of the request for payment.

2. All settlements in claims of lost, damaged, delayed, pilfered, or stolen interline checked baggage will be automatically prorated, provided that each share amounts to $25.00 or more. This proration will be based on the one way coach class fare for the segment of each claim participating carrier as published in the applicable tariff. If the claim participating carrier does not have a coach fare published for its particular segment, the lowest applicable one way fare published (excluding special fares) will be used. In the rare case of a claim participating carrier not being a revenue participating carrier, proration will be based on the above formula as if it had been a revenue participating carrier.

3. The preliminary notification receiver will process the claim to a conclusion with the passenger.

4. If the claim amounts to $100.00 or less, the preliminary notification receiver shall settle the claim at his discretion and bill the other claim participating carrier(s) their prorated share supported by a copy of the station report. If the claim is over $100.00, the preliminary notification receiver shall provide a copy of the preliminary notification to all other claim participating carriers as soon as practicable after a preliminary notice is filed but in no event more than thirty (30) days after the receipt of such notice. The claim receiver shall request proration settlement from all claim participating carriers within sixty (60) days from claim settlement. Those carriers whose prorated share is $100 or less will be billed their share supported by a copy of the station report. Should the sixty (60) day notice be exceeded, entry into an automatic prorate by any other claim participating carrier(s) will be discretionary.

5. When processing claims involving international travel and a Member's(s') pro-rata share of such claim exceeds US $1,500, (or equivalent) the claim-processing Member shall notify each claim participating Member, whose pro-rata share exceeds US $1,500, (or equivalent), before paying the claim. Each claim participating Member will be allowed 30 days from date of notification to review its involvement in the claim and respond to the claim processing Member. The claim participating Member must then provide the claim processing Member with a written authorization of its agreement to participate in the claim before being obligated to do so.

8 6. If the claim processing carrier uses transportation in lieu of cash only to settle a claim, such carrier shall not request proration settlement from any other carrier. If the claim processing carrier uses transportation in lieu of cash to settle a portion of a claim, such carrier shall bill the other claim participating carrier(s) its prorated share of the amount of the settlement not covered by transportation in lieu of cash.

7. In cases of loss where a passenger had checked his baggage on carrier A for online travel and then for reasons voluntary or involuntary, rides carrier B, full responsibility for the loss will be accepted by the carrier indicated on the baggage tag. Should carrier B present the passenger with a new baggage tag, intending to recheck the baggage, then carrier B will accept responsibility for any loss. In all such cases, the carrier shown on the baggage tag will be the responsible carrier. When the name of a carrier acting only as a handling agent for another carrier is shown on the baggage tag held by the passenger, the handling agent will be held harmless.

8. A carrier expediting a bag at the request of another carrier will not be held liable for any loss that might occur provided that the expediting carrier was not involved in the original mishandling.

III. DOCUMENTS AND DATA REQUIRED TO SUPPORT A CLAIM

For all claims of $100 or more and upon termination of an interline loss claim, the paying carrier is required to forward the following documents and data to each claim participating carrier(s) who in turn shall forward its share of the proration to the paying carrier.

1. Copy of the station report and, except for prorated shares amounting to $100 or less.

2. Copy of a tracing document indicating that the claim participating carrier(s) was notified of the loss.

3. Copy of claim prepared by the passenger.

4. Copy of passenger's coupon of passenger's ticket, or its number. If unavailable, the carrier's explanation shall be furnished.

5. Copy of passenger's interline baggage claim check, or its number. If unavailable, the carrier's explanation shall be furnished.

6. Copy of expense draft issued to pay claim settlement or other evidence of claim settlement to passenger.

7. Statement showing the prorated share of each claim participating carrier.

2. Mishandled Baggage Delivery Expense

a. When interline checked baggage is mishandled, the forwarding party will immediately arrange for delivery to the original receiving party at the original air destination, and will include the name of such party in the "instructions" area on the reverse side of the expedite tag. Mishandled baggage shall be forwarded via the most expeditious means using the flights of any airline or operator(s). Final party will deliver baggage to passengers by most expeditious means (with respect to passenger convenience). The final party may bill the full direct ground operator's delivery expense to the party causing the mishandling, within 45 days of the date of such delivery, provided such billing is properly documented with a receipted invoice, the actual arrival time of delivery flight and flight number, time baggage delivered to the receiving party, actual departure time of receiving flight and flight number and passenger's name, when:

(a) the cost of delivery exceeds $3.00 or

(b) the local fare of the final party is less than $15.00 or

(c) the cost of delivery exceeds one-third of the local fare of such final party.

b. No party shall, by means of affixing a tag or other notations on baggage, indicate to a passenger that a named party was responsible for mishandling or late delivery of his baggage.

XI. Excess Baggage Charges

A. Excess Baggage Charges, as required by applicable tariff provisions, shall be collected by the originating airline to the point to which such baggage is checked. Interline settlement shall be made for such portions of excess baggage charges collected as are due to other parties according to the standard interline settlement procedure set forth in Paragraph XII hereof.

B. Each originating airline indemnifies and agrees to hold harmless each party from any and all claims whether valid or not, made against each other party by any and all parties for improper tagging, marking, or routing of baggage by the originating airline. Notice to originating airline, defense or settlement of claim by originating airline, and cooperation by other party shall follow general procedures specified in Paragraph VI.

XII. Interline Settlement

A. In all interline settlements between parties, the party whose tickets or Miscellaneous Charges Orders, whether issued with or without its authority, are honored for transportation shall be responsible for payment of the transportation charges to the party or parties performing the transportation.

B. Settlement for items covered by this agreement between parties who are stockholders or associate members of Airlines Clearing House, Inc., a Delaware stock nonprofit corporation, will be made through Airlines Clearing House, Inc., in accordance with the agreements known as: "Agreement Relating to the Settlement of Interline Accounts Through Airlines Clearing House, Inc.", dated February 1, 1948; and "Agreement Establishing Associate Membership in the Airlines Clearing House, Inc. for the settlement of Interline Accounts", dated January 21, 1971, and certain agreements between Airlines Clearing House, Inc. and its stockholders and associate members referred to in such agreements.

C. Settlement for items covered by this agreement between parties who are not stockholders or associate members of Airlines Clearing House, Inc. will be made as follows:

1. Invoices for interline tickets and exchange orders received from a carrying party by an issuing party on or before the tenth day of the month shall be paid by the issuing party by the twenty-fifth of the same month. Invoices received after the tenth day of the month shall be paid by the issuing party within fifteen days from the date the invoices are received by such party. If however, the issuing party is unable to complete the detailed audit of any invoices prior to the date of payment, as provided above, the issuing party shall, on or before the date of payment, pay to the carrying party 85% or more of the invoice as rendered; the balance over and above the partial payment shall be paid within fifteen days of the original due date of the invoice. Net amounts in invoices shall be to the closest cent.

¢ D. In remitting for sales on which travel agents commissions have been paid the issuing party may deduct the portion of such commission applicable to the face of the carrying party. Settlements shall be made in the currency or its equivalent authorized by the tariffs governing the fares or charges which the settlements cover.

¢XIII. Termination of Prior Agreements

A. The agreement supersedes all previous Interline Ticketing and Baggage Agreements between and among the parties hereto.

¢XIV. Withdrawal from the Agreement

A. Any party hereto may withdraw from the agreement by giving thirty days advance notice of such withdrawal to all other parties hereto and to the Executive Secretary of the Air Traffic Conference of America. Any party hereto may withdraw from this agreement with respect to any other designated party by giving thirty days advance written notice to such designated party, to all other parties, and to the Executive Secretary.

B. However, if such designated party has become insolvent, suspended payments or failed to meet its contractual obligations, or has become involved, voluntarily or involuntarily, in proceedings declaring or to declare it bankrupt, such notice of withdrawal may become effective on the date of written notice to the Executive Secretary. The agreement shall continue in force between the party giving such notice and all other parties hereto with which the party giving notice has heretofore concurred, except such designated party.

C. A party hereto that ceases to operate scheduled service for 30 or more days for any reason other than a strike shall be deemed to have withdrawn from this agreement with respect to all other parties, effective 10 days after written notice of such cessation is circulated by the Executive Secretary to all parties hereto.

D. Any withdrawal herefrom does not relieve the parties from obligations or liabilities incurred hereunder before the date of effectiveness of such withdrawal.

¢ XV. Substitution of Parties

A. Any party hereto, which intends to discontinur its activites as a common carrier by air of passengers and baggage and to transfer all or part of its assets and operating rights to a person, corporation, or other business organization which is a CAB certificated carrier and which is not a party hereto, may assign all of its rights and delegate all of its obligations hereunder to such person, corporation, or business organization (hereinafter referred to as the "assignee"), and the other parties hereto hereby consent to such assignment and delegation and agree to recognize the assignee as a party hereto, in lieu of the assignor, provided:

1. The assignee is authorized by law to acquire the assets and operating rights transferred to it by the assignor and to engage in the transportation of passengers and baggage as a common carrier by air; and

2. The assignee, at least fifteen days prior to the effective date of such assignment and delegation, files with the Executive Secretary of the Air Traffic Conference of America (1) a copy of such assignment and delegation and (2) a duly executed counterpart of this agreement, as amended, together with a duly executed undertaking to assume and discharge all of the obligations of the assignor hereunder.

B. The Executive Secretary shall cause to be mailed promptly to each of the parties hereto notice of the receipt of such counterpart of undertaking.

¢XVI. Future Amendments to Agreement

A. Any amendment(s) to this agreement adopted by the Air Traffic Conference will be immediately circulated to all parties by the Executive Secretary and will be deemed agreed to by all parties if no reply is received within 60 days after the date mailed.

¢XVII. Execution Hereof

A. This agreement may be executed in any number of counterparts, all of which shall be taken to constitute one original instrument. Such counterparts shall be deposited with the Executive Secretary of the Air Traffic Conference of America.

____
(Name of Airline)

By______________________________

____
(Title)

____
(Witness)

Order 83-3-127

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.
on the 24th day of March, 1983

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INVESTIGATION INTO THE COMPETITIVE :
MARKETING OF AIR TRANSPORTATION -- :
AGREEMENTS PHASES :

Docket 36595

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ORDER ON RECONSIDERATION

On December 16, 1982 we adopted a final opinion and order in this proceeding. We decided, among other things, that systems of delegating responsibility to air carrier trade associations to screen prospective common marketing agents in accordance with industry standards were basically procompetitive and should be approved. Specific aspects of these systems, however, were found to significantly reduce competition. The most important of those are the so-called exclusivity provisions which prohibit the use and compensation of persons, other than common agents and members' direct marketing outlets, for the sale of air transportation. These provisions adversely affected competition by eliminating rivalry in marketing methods and the possibility of entry through the use of other forms of marketing.

We noted, however, that interline agreements which permit one carrier's marketing network to write air transportation on another carrier, were entered into at a time when the exclusivity provisions were in place. We did not regard exclusivity as a necessary precondition to interlining because air carriers, under existing agreements, assume financial responsibility for tickets written in their name. But we recognized that carriers might wish to make adjustments in their interline arrangements in light of our decision. We therefore decided to continue to approve, until December 31, 1984, the exclusivity provisions to the extent they preclude member carriers from compensating non-accredited agents for writing interline transportation, absent an agreement between or among carriers authorizing such sales. [1]

We also decided that, except in limited circumstances, the agreements we approved do not require protection from the operation of the antitrust laws. [2] Nevertheless, we granted antitrust immunity under §414 until December 31, 1984 to afford carriers an opportunity to review their agreements in light of our decision and make additional modifications that they may feel are necessary.

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[1] Our transitional measures are described in greater detail below.

[2] We found that antitrust immunity was required with respect to interline exclusivity and certain other provisions approved until December 31, 1984.

We have received petitions from several parties asking us to reconsider a number of our conclusions. Those of the American Society of Travel Agents (ASTA), Associated Travel Nationwide (ATN), the Association of Retail Travel Agents (ARTA), and the International Air Transport Association (IATA), collectively the "proponents," argue that our decision to disapprove exclusivity should be reversed because it is founded upon a misunderstanding of the applicable statute and is contrary to the weight of evidence in the record. 3/ Most of the proponents also suggest that there were procedural defects in reaching our decision and that the only way to correct them is to vacate our decision. The proponents and the Air Traffic Conference of America (ATC) believe, that at a minimum, our decision on exclusivity should have been deferred and additional time provided for filing petitions for reconsideration.

The same parties ask us to reconsider our decision to end antitrust immunity on December 31, 1984. ASTA and IATA insist that a proper legal analysis of the agreements under §412 would make antitrust immunity mandatory. They and the other proponents argue that, in any event, indefinite immunity is required by the public interest. Finally, they ask us to grant antitrust immunity for at least a three year period, so that the agency to which our antitrust powers are transferred will be able to reconsider the issue.

The National Passenger Traffic Association (NPTA) argues in its petition that it was improper to approve any exclusivity provision, even for only two years, and that antitrust immunity should be withdrawn immediately.

The American Express Company and the International Airforwarder and Agents Association (IAAA) have filed petitions in which they ask that we clarify our order. The petition of IAAA is not opposed. The request of American Express, however, has generated a number of supporting and opposing answers. In its petition, it asks that we clarify whether we intended to permit accredited travel agents to also negotiate directly with air carriers. Stated another way, it asks whether we intended to permit agents to hold dual statuses.

For the reasons set forth below, we will affirm our disposition of the issues in this proceeding and deny the requests for modification of our final order of ATC, ATN, ASTA, ARTA, IATA and NPTA. We have carefully considered the arguments these parties make in support of their positions. The new arguments that have been raised do not convince us that there are legal, substantive or procedural errors that warrant a result different from that reached in Order 82-12-85. We will, however, grant American Express' and IAAA's requests that we clarify our opinion, to the extent set out below.

3/ The filings of ASTA and IATA were accompanied by motions to expand the page limitations for petitions for reconsideration. We will grant their motions.

LEGAL STANDARDS

A. Application of Section 412

A number of parties, particularly IATA, argue that we have misapplied section 412 of the Act. That provision governs the approval of carrier agreements that have been filed for Board approval. It provides that we must disapprove agreements we find are adverse to the public interest. In addition, we must disapprove an agreement if we find that it may substantially lessen competition, unless we find that it is necessary to meet a serious transportation need or to secure important public benefits, and such needs cannot be met or benefits secured by reasonably available alternative means having materially less anticompetitive effects. In this proceeding we have focused on the second "competition" test because virtually all the challenges to the agreements are founded upon their effects on competition. [4]

In our order, we found that the competition test of section 412 requires a three step analysis. First, an agreement's effects on competition are examined. Adverse effects on competition are weighed against any procompetitive effects. At this stage only effects related to competition are considered. [5] If we find that an agreement is not likely to substantially reduce competition, our analysis ends.

However, if we find that an agreement substantially reduces competition, section 412 provides for a further inquiry. We must consider whether the agreement should nevertheless be approved because it is necessary to meet a serious transportation need or to secure important public benefits. In our order we indicated that it would be at this stage that public benefits unrelated to competition would be considered. The agreement can only be approved if we also find that these benefits or transportation needs cannot be obtained through the use of any reasonably available less anticompetitive alternatives. If we find that they cannot be obtained through materially less anticompetitive alternatives, the agreement must be approved and antitrust immunity must be conferred under §414.

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[4] In its answer to various petitions, ASTA asserts that our staff was prejudiced against its position in this case. One of its grounds for asserting prejudice is a discussion of the two tests for disapproval of agreements in section 412 that appears in a "For Information" memorandum released to it under the Freedom of Information Act. ASTA apparently misinterprets passages of the memorandum. A portion of it states that it is IATA's and ASTA's position that "at most" a "perfunctory competitive analysis" is required under section 412. ASTA Answer at 2. While ASTA apparently believes the statement was made with respect to the second test in section 412, the statement was clearly addressed to consideration of competition among the other policy considerations under the general public interest test. In any event, that was ASTA's position. ASTA Brief to Judge Yoder at 9. *See also* IATA Brief to Judge Yoder at 16. Orders 79-12-163/164/165 at 59 are to the same effect.

[5] Courts reviewing agreements under section 1 of the Sherman Act do not consider effects unrelated to competition in their analysis. *National Society of Professional Engineers v. U.S.*, 435 U.S. 679, 690 (1978). Our first inquiry under section 412, then, is essentially the same as a court would undertake. While the standards of §1 of the Sherman Act and §412 are similar, they are not identical. We can draw on antitrust precedent for guidance in making our initial competitive determination, but recognize that Congress intended to allow us to bring our special expertise to work on agreements we consider under §412. *See* *U.S. v. Third National Bank of Nashville*, 390 U.S. 171, 189 (1968).

IATA finds error in this step-by-step analysis. In its view, §412 provides for a very simple balancing of the pros and cons of an agreement. This balancing is "triggered" by an attack on an agreement as being anticompetitive or the Board suggesting it has concerns about the competitive effects of an agreement. 6/ IATA claims that:

> "If the Board cannot find that approval is in the public interest because an agreement raises substantial competitive questions, section 412 simply requires that the Board *array* the agreement's public benefits against *identifiable less* anticompetitive methods of achieving *those same benefits*." 7/

As IATA interprets §412, competition related benefits and those unrelated to competition are considered together. As we understand its views, where there are public benefits, we must weigh those against the possibility of obtaining these benefits through the use of materially less anticompetitive alternatives.

We cannot accept IATA's interpretation, for a number of reasons. First, it relegates competition to coequal status with the other factors to be considered in our §412 analysis. The Airline Deregulation Act directs us to rely on competition to the greatest extent possible in the exercise of our regulatory powers. 8/ The legislative history of the ADA uniformly supports this interpretation. It indicates that we are to stress competition, 9/ that we are expected to undertake a careful review of

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6/ IATA maintains that this threshold requirement is met by our Instituting order in this proceeding which suggested competitive concerns.

7/ IATA Petition at 4. Emphasis in the original.

8/ Section 102(a)(4) of the Act, as amended, 49 USC §1502(a)(4), provides:

> "(4) The placement of maximum reliance on competitive market forces and on actual and potential competition (A) to provide the needed air transportation system, and (B) to encourage efficient and well-managed carriers to earn adequate profits and to attract capital, taking account, nevertheless, of material differences, if any, which may exist between interstate and overseas air transportation, on the one hand, and foreign air transportation, on the other."

9/ H.R. Rep. 95-1211, 95th Cong. 2d Sess. (1978) at 5-6.

agreements under the antitrust laws, [10] and that the section is patterned on the *Local Cartage* test [11] and the revised airline merger standard [12] which focus on competition. Second, §412 clearly contemplates a step-by-step approach. By its terms, it places the initial burden of producing evidence on the anticompetitive effects of an agreement on opponents of the agreement. [13] Moreover, the plain wording of section 412 states that we are not required to consider transportation needs or public benefits until after we have made a determination that an agreement may substantially reduce competition. Indeed, IATA's own structure requires an initial analysis focusing on competition. [14] Finally, adoption of IATA's approach would make it impossible to rely upon judicial precedent under section 1 of the Sherman Act for guidance as to an agreements likely competitive effects. Our conclusions would be the undisciplined results of open-ended balancing of widely different factors. As we have already indicated, Congress acted decisively to restrict our ability to override the pre-eminent position of competition in the deregulation scheme.

10/ "These changes are necessary to prevent the Board from approving and thus immunizing agreements which will have significant anticompetitive effects while assuring that air carriers will be able to enter into agreements designed to promote a strong, more competitive and convenient air transportation system. At the outset, it should be noted that both the Department of Justice and the Civil Aeronautics Board have testified that the enactment of stricter standards governing inter-carrier agreements should have no effect on the day-to-day operation of airlines. Under the antitrust laws, agreements designed not to eliminate competition among carriers, to permit firms to provide service on an integrated nationwide basis that they could not provide alone are not unlawful if they are designed to avoid unnecessary, incidental anticompetitive effects." S. Rep. 95-631, 95th Cong., 2d Sess. (1978) at 82-83.

11/ H.R. Rep. 95-1211, 95th Cong. 2d Sess. (1978) at 18. Admittedly the test established in the *Local Cartage* case, 15 C.A.B. 850, 852-53 (1952), was often inconsistently applied. During the heyday of regulation, despite the literal terms of the test, we nominally gave weight to competitive concerns, but subordinated competition to other goals. For example, this was true with respect to the capacity agreements. *See U.S. v. CAB*, 511 F.2d 1315 (D.C. Cir. 1975). Given the clear policy directive of the ADA and its legislative history, Congress intended that we consistently apply *Local Cartage* to place our principle reliance on competition.

12/ S. Rep. 95-631, 95th Cong., 2d Sess. (1978) at 83.

13/ IATA's interpretation is inconsistent with judicial interpretation of the related Bank Merger Act test, while ours is not. *U.S. v. Third National Bank in Nashville*, 390 U.S. 171, 182 (1968).

14/ But nothing in the Act or its legislative history supports IATA's characterization of this initial inquiry as a trigger to an open-ended balancing of all benefits of an agreement.

IATA's principal argument in support of its position is that our interpretation of §412 in this case deviates from our previous statements of governing law. It cites a portion of our decision in the *IATA Show Cause Proceeding* to support its view. [15] Nothing in that order supports IATA's position. The language it cites is merely an alternate statement of the approach we have adopted. [16] Moreover, in the order in which we rendered our final decision in the *IATA Show Cause Proceeding*, we specifically rejected the argument that benefits unrelated to competition must be taken into account in determining whether an agreement substantially reduces competition. [17]

IATA also argues that our approach, with its reliance on competition, will make it impossible for anyone to obtain "meaningful approvals (those with antitrust immunity) as Congress intended." [18] IATA argues this approach was found to be unlawful in *U.S. v. CAB*. [19] IATA apparently believes that if we merely approve an agreement without also conferring antitrust immunity, our decision is tantamount to an advisory opinion.

We reject IATA's argument. The effect of its interpretation would be to require us to grant immunity in every case in which an agreement was approved, regardless of the basis for our approval. In short, IATA would have us find that competitive features or benefits of an agreement can be invoked to secure a mandatory antitrust exemption because in its view, the only approval that is meaningful is one that conveys immunity.

Adoption of this legal interpretation would effectively repeal the statutory changes made by the ADA. Congress in amending §414 clearly provided that we may withhold antitrust immunity where it is not necessary. Prior to the Airline Deregulation Act, antitrust immunity automatically atached to agreements approved under §412. With its enactment, we gained the discretion to withhold it. 20/

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[15] IATA Petition at 7, quoting Order 80-4-113 at 28.

[16] "[I]nitial inquiry must be made into the competitive implications of a filed agreement. If the agreement is found to contain anticompetitive features -- to be 'plainly repugnant to antitrust principles' or to 'substantially reduce or eliminate competition' -- then we are precluded from granting approval without further consideration. In both instances, approval may be found warranted notwithstanding anticompetitive findings if we find in addition that the agreement is necessary to meet a serious transportation need or to secure important public benefits and we do not find that there are less anticompetitive alternative means to meet such need or to secure such benefits which would not unduly sacrifice other public interest values." Order 80-4-113 at 28.

[17] Order 81-5-27 at 7, May 6, 1981.

[18] IATA Petition at 12.

[19] 511 F.2d 1315, 1322 (D.C. Cir. 1975).

The amendments were intended to limit the instances where antitrust immunity is granted. If approval without immunity is an empty gesture, as IATA argues, Congress would not have amended §414 to eliminate the automatic conferral of immunity upon Board approval of an agreement. In amending §414 to require specific findings, in addition to those of §412, Congress recognized that some approved agreements would not receive antitrust immunity. This result was intended. 21/

Our consistent interpretation of §§412 and 414 has, contrary to IATA's implications, resulted in just the type of flexible decisionmaking that Congress envisioned in codifying a more stringent standard for approval and enabling us to tailor antitrust relief to the facts at hand. Our approach has not, in fact, precluded us from approving most of the agreements in this case or in many other cases that have come before us. Nor has it precluded us from finding agreements to be anticompetitive but necessary to secure public benefits or meet transportation needs. We have made such findings in a number of cases. In those instances, antitrust immunity was granted as required by the Act. 22/

Nor is approval without immunity meaningless. Especially after lengthy procedures as in this case, we believe that our findings will be given significant deference by a court that may subsequently review the agreement. Admittedly our decision will not prevent subsequent antitrust challenge. However, the reviewing court will have to consider our special expertise in the air transportation industry and find significant error in our findings on an agreements' likely competitive consequences.

The case of U.S. v. CAB lends no support to IATA's position. In that case, DOJ argued that we could not approve an agreement that we found to be anticompetitive but that provided important public benefits, unless we found that it was impossible to obtain those benefits through the use of any materially less anticompetitive alternatives. The court rejected the

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20/ Section 414 requires only that antitrust immunity be extended to agreements that we find to be anticompetitive but approve because they serve transportation needs or provide public benefits that cannot be obtained by materially less anticompetitive alternatives.

21/ "H.R. 12611 limits section 414 immunity in several respects. First, the bill clarifies that section 414 immunity is limited to the antitrust laws. Second, the bill provides that immunity shall be granted only insofar as is necessary to permit completion of transactions specifically approved by the Board, or transactions necessarily contemplated by a Board order. Third, the bill provides that the grant of antitrust immunity is discretionary with the Board and that the Board in granting immunity must find the grant to be in the public interest." H.R. Rep. 95-1211, 95th Cong., 2d Sess. (1978) at 18.

22/ Orders 81-5-27, 82-6-168, 82-1-47, and 79-1-161.

impossibility test as too rigorous and inconsistent with the substantial discretion the then existing §412 vested in the Board. 23/

Our disapprovals in this case are not based upon the existence of materially less anticompetitive alternatives. Rather, we have found that the provisions substantially reduce competition and are not necessary to obtain public benefits or to serve transportation needs. 24/ Moreover, our competitive analysis is very similar to that which applies to agreements in other industries, consistent with the ADA amendments to section 412. The court in U.S. v. CAB was not considering the revised statute or its reordered priorities in agreements cases. 25/

B. Review of Specific Provisions

IATA also maintains that we cannot review individual provisions of its resolutions. In its view, the exclusivity provisions, for example, are a portion of a single agreement governing the passenger sales agency program. If we find there are procompetitive benefits to the common accreditation, as we did, those benefits must be attributed to exclusivity as well.

IATA's argument has no merit. Since at least 1948 we have consistently held that we have the right to disapprove individual provisions of agreements. 26/ This conclusion was subsequently upheld in the courts. 27/

23/ 511 F.2d at 1320-21.

24/ Even if we had conducted the ana[illegible] IATA suggests, the record establishes that a less anticompetitive alternative -- a non-exclusive system -- is reasonably available. The availability of alternatives must rest on our judgment about what elements of an agreement produce its asserted benefits. IATA's suggestion that our reliance on competition renders any other structure "not reasonably available" is designed to deny us this discretion. In this regard its demand that the existence of identifiable alternatives be proven, when an industry agreement has precluded their very existence, would create a variant of the impossibility standard rejected by the Court decision upon which IATA relies. See National Small Shipments Traffic Conference v. CAB, 618 F.2d 819, 831 (D.C. Cir. 1980) and Standard Oil Co. v. U.S., 377 U.S. 293, 308-10 (1949).

25/ The finding of the court is consistent with the revised statutory language that requires that we find materially less anticompetitive alternatives are not reasonably available before approving an anticompetitive agreement.

26/ Air Cargo, Inc. Agreement, 9 CAB 468 (1948).

27/ McManus v. CAB, 286 F.2d 414, 419 (2nd Cir. 1961). cert. denied 366 U.S. 928 (1961).

IATA's reliance on Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc., 28/ is misplaced. The Court there specifically found that the price restraint at issue was a necessary consequence of the integration efficiencies of an aggregate license. 29/ The crucial finding in BMI was a relationship between the procompetitive benefits of an agreement and the challenged restraint. The determination whether a particular restraint is reasonable and necessary to achieve procompetitive benefits or whether the activity unduly restrains competitive interplay depends entirely upon an analysis of competitive effects in a particular factual context. For example, restraints that were alleged to produce efficiencies were struck down recently in Arizona v. Maricopa County Medical Society. 30/

We very carefully considered the relationship of exclusivity to the benefits of common accreditation. We found that

> "the exclusivity provisions do not themselves produce efficiencies nor are they necessary to achieve the efficiencies of common accredition. Rather, they constrain competition among airlines, between carriers and agents, and among marketing outlets. Industry-wide agreements with those objectives and effects are not tolerated under traditional antitrust policy." 31/

Just as important, acceptance of IATA's view would lead to intolerable results. Parties may incorporate unreasonable and unnecessary restraints on competition in agreements that produce significant public benefits in order to insure that the "balancing" of effects occurs. We would be able to reach offensive elements only by finding that the entire agreement should be disapproved because the agreement without the offensive provisions was a materially less anticompetitive alternative. 32/ This disapproval, however, would extend to all components of the agreement. Parties would be unable to act in reliance on any aspect of the agreement, even though our disapproval related to a limited concern.

Furthermore, IATA's basis for arguing that exclusivity is a part of a single agreement apparently is based on the fact that virtually all of its rules governing the passenger agency sales program are contained in a single resolution, Resolution 802. That resolution is not, however, the product of a single meeting of the minds of its members. Rather, it is the end result of almost 40 years of IATA meetings, with repeated amendments, revisions, deletions and simplifications. It is only a single agreement

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28/ 441 U.S. 1 (1979).

29/ 441 U.S. at 21-22. The Court merely found the provision did not warrant per se treatment. In another case, involving the same provision, it was struck down as an unreasonable restraint because of the absence of viable alternatives to the blanket license. Buffalo Broadcasting Corp. v. ASCAP. 1982-2 Trade Cases, ¶64,998, (S.D. N.Y. August 19, 1982).

30/ ____ U.S. ____, 102 S.Ct. 2466, 2477 (1982).

31/ Order 82-12-85 at 38.

32/ Given the substantial adverse effects of exclusivity, such a finding would be justified in this case.

because IATA has labeled it as such. 33/

COMMON ACCREDITATION

No party challenges our generic finding that adoption of common accreditation systems such as those at issue in this case is neither adverse to the public interest nor a substantial restraint on competition. In fact, we found that, on balance, competition in the air transportation industry was improved by reasonable standards governing the selection and retention of common agents. We found that the delegation of responsibility to screen applicants, monitor their activities and take enforcement action where conference rules are violated has resulted in the virtual integration of air carrier member marketing activities, at least through agents. Duplication in the creation and oversight of agent networks has been eliminated by the delegation of responsibility over agent distributors to carrier trade associations. Thus, carriers can take advantage of the inherent economies of a system where costs are spread over a large base. 34/

We also found that common accreditation increases competition by facilitating carrier entry into new markets, by eliminating duplication in agent accreditation costs, and improving the price and service information available in the marketplace. 35/ IATA and most other parties to this proceeding, as well as the presiding administrative law judge, agree with our conclusions about the efficiency properties of these cooperative activities. However, IATA objects that we have arbitrarily categorized some as competition related in order to avoid the general balancing of all benefits required by §412 and the mandatory conferral of immunity that attaches whenever an agreement is approved after such balancing occurs.

We have already explained why we believe IATA's statutory construction is improper. When agreements do not substantially reduce competition, the possible existence of public benefits that might also warrant approval of the agreement does not affect our finding under section 412 that the agreement should be approved. The interpretation urged by IATA would, however, effectively remove the Board's ability to withhold antitrust immunity, even after an implicit finding that it is not necessary to enable the transaction to proceed.

33/ Another legal argument raised by various parties is that opponents of the agreements, who bear the burden of proving that an agreement will have a substantial adverse effect on competition, have not met their burden of proof. In their view, the opponents' burden is only met if they show actual measurable harm to competition. These parties merely assert that we are in error but make no effort to refute our lengthy discussion of this issue at pages 26 and 27 of our opinion. For the reasons set out there, we affirm our holding that opponents of agreements may rely on economic testimony as well as established antitrust principles to carry their burden of proof. The cases cited in footnote 24, _supra_, are to the same effect.

34/ Order 82-12-85 at 35.

35/ Order 82-12-85 at 36-37. We also found, however, that common accreditation systems also act to reduce competition in some ways, particularly because it tends to chill individual carrier incentives to devise more efficient methods of distribution.

Nor have we failed to consider all the alleged benefits of the agreements, as IATA maintains. IATA would have us consider only whether an agreement produces some desirable effects. It would not distinguish between those effects relating to competition and other effects. However, we think a more probing analysis is required. In applying our statutory analysis, we have properly focused on whether each and every provision of the agreement is necessary to produce public benefits. For the most part, we concluded that the asserted benefits of common accreditation did not flow from impermissible cooperative behavior that had to be shielded from operation of the antitrust laws but instead resulted because of the mutual competitive advantages enjoyed by air carriers and travel agents operating under these agreements.

IATA specifically takes issue with our treatment of interlining as a public benefit argument rather than as a procompetitive aspect of the conference agency programs.

In our order, we concluded that while interlining did increase competition in the air transportation industry, it occurs because of the existence of interline agreements that are separate and distinct from those at issue in this case. We concluded it would be improper to attribute the competitive benefits of one set of agreements to a second set of agreements. This view is substantiated by the fact that interlining occurs between conference members and nonconference carriers, even though the latter are not members of the conferences. Moreover, carriers accept interline tickets written by commercial travel departments and other persons who are not conference members.[36] Carriers are also free to use the conference system but not interline. There is, then, no necessary relationship between the increased competition resulting from interline agreements and the conference program. While some parties contend that carrier confidence in the distribution system facilitates interlining, it does not follow that carriers will refuse to interline under other circumstances. In fact, as we discuss more fully below, the weight of evidence in the record supports the opposite conclusion.

EXCLUSIVITY

A. Exclusivity Substantially Reduces Competition.

The exclusivity provisions of the ATC and IATA passenger agency programs require that member carriers shall only retain as agents persons whose names appear on an accredited agents' list. Only locations that have been approved and placed on that list may be used. No commission or sales remuneration (ATC) or sales agency remuneration (IATA) may be paid to any other person.

We found that the practical result of these provisions has been to make travel agents virtually the only marketers of air transportation, other than the air carriers themselves. 37/ One of the major reasons for this conclusion was the fact that virtually all carriers participate in the conference programs. Persons who may wish to enter the industry, but do not meet the ATC or IATA standards or who wish to deal with air carriers on different terms cannot approach conference carriers to gain entry into the marketing industry.

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[36] These arrangements do not violate the exclusivity provisions because the outlets are not compensated for providing marketing services.

IATA challenges this conclusion by arguing that carriers have alternatives to its program. It argues that carriers will only belong to the IATA programs so long as their participation meets their commercial objectives. They will withdraw when it does not, as Pan American World Airways did in the early 1970's. In addition, IATA notes that many U.S. and foreign carriers do not belong to IATA. 38/

The weakness in IATA's argument is that it fails to recognize that the only real alternative to its program is the ATC program, which compliments its own. The provisions of the two conference systems are virtually indentical. With few exceptions, the specific standards of the IATA common accreditation system are duplicated in the ATC program. As a result, there is no effective competition between the IATA and ATC programs. A person

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37/ We defined the relevant market in which competitive effects were to be considered as "passenger air transportation in the U.S." IATA criticizes this definition on the grounds that it ignores cargo and international air transportation and that it is not substantiated in terms of cross-elasticities of supply and demand by service function for carriers and consumers.

We doubt that IATA could seriously dispute our conclusion that their agreements' effect on the price and supply of air transportation services should be our primary focus. Our concern should be with harm to the public, not individual competitors. Such harm is proven by an adverse effect on the price or supply of air transportation services. However, air transportation marketing is a relevant submarket we also considered. Moreover, we looked at passenger air transportation as distinct service functions. From the consumer perspective, cargo and passenger air transportation are not interchangeable. While there is a measure of cross-elasticity of supply, i.e. carriers may switch from providing passenger to providing cargo transportation, they are relatively insignificant and major changes in the character of an airlines' operations seldom occur.

While we could have defined all international air transportation within the relevant market, because of the relationship of marketing to price and supply and consistent with consumer demands, that was not the focus of our decision. Instead, we limited our geographic market definition to travel provided within the U.S. or originating here. As we indicated in our discussion of international comity, our decision reaches only those agreements that affect transportation sold in this country. Perhaps the definition could be better phrased, in view of this consideration, to be "passenger air transportation sold in the U.S."

38/ It lists Northwest, Continental, Delta, Air Florida, Capitol, Republic, World, Metro, Arrow and Singapore Airlines. It does not mention, however, that all but the last four are members of ATC.

wishing to enter the marketing industry does not have the option of choosing the system with the more desirable rules.[39]

From the carrier's perspective, access to the marketing system may be obtained by membership in one or the other conference. This conclusion is borne out by the fact that many ATC carriers have not chosen to join IATA, even though they provide international services. Carriers should not be forced to withdraw from both or either the ATC and IATA programs as a price of marketing innovation. Rather they should be free to pursue alternatives, in addition, if they perceive it to be in their interest.

The other potential disciplinary force on the accredited agent system parties have suggested is non-agent marketers. This line of argument was based upon the view that the IATA agency programs only deal with persons acting in an agency capacity. Competition is allegedly provided by persons acting in "non-agency" capacities who act to prevent abuses in the "agency" distribution system.

We remain convinced that the potential disciplining force of "non-agent" marketers would be neglible while exclusivity is retained. The term agent, as used by the conferences, is an extremely vague concept that has generally been interpreted very broadly. Few entities are likely to enter while "agency" exclusivity is in place.[40] Despite the fact that IATA's rules have been limited to agency relationships for some time, IATA carriers have not exploited the freedom to use non-agent marketers.[41]

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[39] Rather, the person will choose the system to which he will apply on the basis of whether he wishes to concentrate his sales efforts on domestic carriers (ATC) or international carriers (IATA). Because the rules are virtually identical, all but about 500 of the approximately 20,000 agents have been accredited by both conferences. Saunders (ATC) 47 Tr. 194. ATC-IR-905 at 152.

[40] Even before the time when IATA suggests it limited its exclusivity provisions to agency relationships, IATA was relying upon the existence of a potential group of non-agent distributors, particularly net fare arrangements, to support its position that its conference program did not raise competitive concerns. See IATA Petition for Partial Reconsideration of Order 79-9-64, at 5-6, October 5, 1979, Docket 36595. Moreover, ATC carriers who are technically subject to the allegedly broader prohibition on non-agent marketers, do in fact use all the same outlets IATA carriers use.

[41] IATA correctly points out that our statement that it has never had a provision comparable to ATC's marketing exclusivity is in error. Nevertheless the underlying proposition for which the statement was cited as support remains sound. The presence of a marketing exclusivity provision has not foreclosed all non-agent marketing systems, nor has its removal induced new types of entry. See fn. 40, supra.

The exclusivity provisions substantially reduce competition because they eliminate rivalry in air carrier distribution systems. [42] They diminish carrier opportunities to employ innovative and potentially more efficient distribution systems. Normal market pressures to innovate are eliminated. The threat that another carrier will improve its marketing system is eliminated. From the agent's perspective, its incentives to innovate and improve efficiency are reduced. Only persons operating under exactly the same rules may sell air transportation. In short, exclusivity eliminates the threat of potential entry into the air transportation marketing industry that is a prerequisite to optimum competitive performance.

B. Reliance on Matters Outside the Record.

IATA also argues that our decision relied on travel agent dominance as our basis for disapproval of the exclusivity provisions. Instead, the essence of our decision on exclusivity was that the normal operation of competitive forces was thwarted by the unnecessarily restrictive provisions of the agreements. Because of the nature of the conference agreements and the participation of virtually all air carriers, the evidence clearly established that the exclusivity provisions have adverse effects on competition between air carriers. We determined that the record did not provide a sufficient basis to conclude that travel agents had collectively exercised the power to foreclose new forms of distribution in the air transportation marketing industry. [43] This does not necessarily detract from our conclusions that the dominance of the relatively homogenous marketing system enforced by the exclusivity rules inhibited air carriers' ability to deal with alternative or innovative marketing outlets.

Rather than confront the substantial legal, economic and factual support for this general conclusion, ASTA, ARTA and IATA suggest that the sole basis for the Board's actions rested on evidence and arguments outside the scope of the hearing record.

They specifically refer to statements made by Chairman McKinnon during the course of the meeting where we instructed the staff on the decision we wished it to prepare in this case. [44] Selective references to a few phrases that were made during the course of a lengthy discussion of the exclusivity issue and its competitive effects do not detract from our decision or our decisionmaking process.

42/ IATA challenges our citations to the testimony of Malin (USAir) 53 Tr. 53 and Wilson (Ozark) 45 Tr. 103-04 in support of this proposition. We have carefully reviewed their testimony and conclude that we have properly interpreted it.

43/ Order 82-12-52 at 31-32 and 46 n. 158.

44/ ASTA has submitted transcripts of our discussions with staff at meetings held on December 9th and 15th for inclusion in the record in this proceeding. A number of parties rely upon statements made during those meetings and that appear in those transcripts. Our procedural rules generally prohibit reliance upon anything said during the course of a meeting held pursuant to the Government in the Sunshine Act, 5 U.S.C. §552b, in cases before the Board. 14 CFR §310b.9(c). We will address the issues they raise here only because we wish to remove any cloud over our decision.

The Chairman's specific remarks were as follows:

> "I am really disturbed in this case by one particular factor, and that's the travel agents' ability to play a destructive part in the airline system.
>
> In 1978 we deregulated the airlines and allowed the airlines to have at each other in any way possible. And it's gotten really tough and rugged. And they gradually are learning to live under the system.
>
> In order to survive an airline needs the ability to have some type of marketing ability for their product that may be different from the current system.
>
> It's too late for Braniff, and I'm not sure the travel agencies were the full cause of Braniff's demise, of course, but towards the end they played a role.
>
> And it may be too late for some other airlines; it may not be.
>
> But I think the airlines deserve the opportunity to have some kind of alternate ability to market tickets to serve their own selfish interest and survive.
>
> And when you get a whole group of power against you it becomes almost impossible to overcome that." ASTA Motion to File a Petition in Excess of Page Limitations, Appendix A, December 9, 1982, at 42-45.

ASTA, IATA and ARTA view the entirety of the Chairman's remarks to be based upon extra-record information. They cannot be construed in that way, however. The predicate for his reference to the Braniff bankruptcy is a concern about travel agents' ability to influence air carrier decision-making. On this issue there is substantial evidence in the record.

Travel agents sell well over half of most air carriers' tickets. 45/ Any significant reduction or shift in sales on a given airline will be immediately felt. Since there are no marketing alternatives to travel agents, agents hold significant power over carriers as both the economic 46/ and carrier witnesses testified. 47/ Moreover, there are

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45/ Order 82-12-85 at 1.

46/ Guerin-Calvert (DOJ) 84 Tr. 109-111; Eichner (Ticketron) 76 Tr. 58-59 and Banks (NPTA) 80 Tr. 49-50.

47/ Various carrier witnesses testified that they believed travel agents have the ability to divert passengers, that they have done so on occasion and that this fact was considered by various carriers in making marketing decisions. Wilson (Ozark) 45 Tr. 86-88; 123-129; Blake (Eastern) 47 Tr. 7-10; Nesbit (Continental) 48 Tr. 48-49; Palm (Republic) 52 Tr. 135-136; and Malin (USAir) 53 Tr. 28.

numerous examples in the record of instances where agent reaction was an important factor in air carrier decisions concerning their distribution systems, as we found in our order. 48/

The Chairman, then, makes reference to Braniff's bankruptcy as an instance where the presence of marketing alternatives may, have been desirable. It has been widely alleged that Braniff Airways bankruptcy petition was induced by a sudden shift of business away from that carrier. 49/ Properly construed, therefore, the Chairman's remarks were only meant to illustrate a distinct failure of the present system -- the lack of competition in air transportation distribution that results from the exclusivity provisions. Numerous other instances that appear in the record could also have been offered. 50/

Nor is it clear that the Chairman's use of Braniff as an example of what may occur because of the absence of marketing alternatives was improper. The positions of ASTA, IATA, and ARTA are premised upon the view that nothing extra-record can be heard. In that way, we are to be treated like a jury. They would require that we hear only one case at a time. This approach is impractical and inconsistent with our role. We do more than adjudicate cases. Our various duties require us to keep informed on general economic conditions and occurrences in the air transportation industry. In the course of carrying out these duties, we are likely to hear statements relevant to the general legal and economic questions at issue in a given case. That possibility does not provide a basis for claiming unfairness. 51/

We closely monitored the Braniff bankruptcy. Information on that carriers' reasons for cessation of its operations and the phenomena of travel agents plating away from carriers in economic distress has been submitted in a number of dockets and other public records. For example, in Docket 40836 we considered amendments to ATC agreements that obligated air carriers participating in the Area Settlement Plan to provide alternate air transportation to passengers holding travel agent issued tickets on an ASP

48/ Order 82-12-85 at 46 n. 158. See also pages 45 n. 154 and 73 n. 243.

49/ Only ARTA actually argues that agents did not in fact plate away from Braniff. It makes this argument despite the fact that it relied upon the opposite position in another proceeding. ARTA filing of May 18, 1982 in Docket 40836.

50/ For example, Member Bailey cites United's experience when it attempted to establish a flat commission rate. [illegible]'s assertion that its filing of a rebuttal exhibit [illegible] experience to show agents' ability to adversely affect carrier revenues, as an [illegible] exhibit purported to show, is without foundation. Its rebuttal exhibit merely shows that United's traffic loss was not matched by traffic gains on selected competitors. It does not demonstrate that agents did not "sell away" from United. The data used in that exhibit is far too gross an indicator to pinpoint the sales activity of agents as a group. Moreover, a portion of an article in an agent periodical was read into the record to show that some travel agents have reached the opposite conclusion. Eichner (Ticketron) 76 Tr. 81-82.

51/ Order 79-3-152 at [illegible] and cases cited.

carrier that has gone into default. One of our reasons for approving those amendments was to protect weak air carriers from adverse effects of a loss of travel agent confidence. We concluded that the agreements would reduce agent concern about the financial stability of some carriers, thereby reducing incentives to plate away from carriers and further undermine their financial position. 52/ Such references to conclusions reached in other dockets is perfectly acceptable. Indeed, that is the way we build our expertise in the air transportation industry.

C. Public Benefits

Once it is determined that an agreement may substantially reduce competition, §412 requires that we determine whether an agreement should nevertheless be approved because it meets a serious transportation need or secures important public benefits. As we have already noted, we found that the exclusivity provisions of the passenger agency agreements were not necessary in order to obtain the procompetitive benefits of the common accreditation systems.

ASTA, IATA, ARTA and ATN challenge this conclusion. They argue, as they have throughout this proceeding, that the exclusivity provisions are essential to the preservation of any benefits of the program. They believe that if exclusivity is eliminated, air carriers will, over time, increasingly use non-accredited outlets and the conference system will inevitably fail.

We carefully considered this issue in our opinion and we will not repeat all our findings here. We will, however, make two points. First, we found that the common accreditation systems produced their own incentives to participation, such as a lower cost marketing network, greater numbers of marketing outlets and lower entry costs when entering new markets. Second, these conditions constitute a substantial advantage for conference agents. Persons dealing with airlines outside the conferences must deal with airlines individually or, potentially, through other accreditation systems. Not only will the costs of such transactions be higher to air carriers, but they will be less convenient than the use of commonly accredited agents.

ARTA does raise a novel public benefit argument. It argues that our decision did not fully address how increased competition will adversely affect travel agents. In its view, we have a duty under §412 to consider the reasonableness and fairness of an agreement to those primarily affected by it. ARTA argues that exclusivity is the primary benefit of travel agents derive from participation in the agency programs. With its disapproval they lose that benefit but still must bear the burden of meeting the various standards for accreditation.

52/ See Order 82-8-118 at 5, August 26, 1982.

We reject ARTA's argument because the primary benefit that agents enjoy by meeting the conference standards is their ability to represent all air carriers after having gone through, at most, two screening procedures. If travel agents regard the standards as unreasonable, they can seek modification of the conference standards. In this regard our decision to lift antitrust immunity will insure that the accreditation standards are not implemented in a way that places unreasonable burdens on agents. Alternatively, disaffected travel agents could deal with airlines outside the ATC or IATA framework. 53/ We do not doubt that some agents may regard exclusivity as a benefit because it limits the kind of marketing competition that they face. But we cannot base our decision on private benefits that are achieved at the expense of consumers who will benefit from increased competition in the air transportation marketing industry.

We must also be concerned that we do not adopt regulatory policies that favor travel agent interests over those of air carriers. Arguments have historically been made that exclusivity is the quid pro quo for permitting carriers to jointly fix commission rates.

Our experiences with deregulation make it clear that entry and pricing are related concepts. Restraints on one must be lifted if restraints on the other are removed. In 1978 and 1980 we disapproved the IATA and ATC agreements which fixed the compensation member carriers could pay their agents. Since that time commission rates have increased dramatically. Constraints on entry into the marketing industry, i.e. the exclusivity provisions, have continued throughout that period. While we did not specifically find that commission payments are excessive, we concluded that the only assurance that commissions are reasonable can come from the operation of the unfettered marketplace. Competitive forces cannot function properly unless the exclusivity provisions are disapproved.

IATA and ARTA once again argue that exclusivity is necessary to insure that consumers will not be injured by incompetent marketers. This argument was also carefully addressed in our opinion. Neither party has cast doubt on our finding that air carriers will shield the public from incompetent marketers because they will bear both the financial costs and the loss of good-will that can result from the appointment of unqualified or dishonest distributors.

IATA also argues that our decision does not give enough weight to foreign government concerns about this case. IATA is especially concerned that our disapproval of exclusivity will lead to a system of captive agents that would be unaccessible or extremely costly to foreign carriers. In its

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53/ Admittedly, our decision to provide a transitional period may make these alternatives less attractive. However, we contemplated that the conferences will use this time to review the agreements critically with the purpose of insuring standards that were reasonable and narrowly tailored to avoid anticompetitive effects. Moreover, we expect that carriers would be unwilling to retain or set unreasonable standards that might induce travel agents to abandon the airline conferences.

view, common sense suggests that large carriers will have an inherent advantage over small carriers when captive agents come into existence.

The weakness in the captive agent argument is that it assumes that an agent will derive more revenue if it sells the air transportation of just one or a very few carriers rather than offering a broader inventory. The common accreditation system has been successful because consumers have shown a distinct preference for one stop shopping, as the unprecedented growth of the travel agency industry demonstrates. Passengers want to be able to obtain fare and service information, as well as ticketing and reservations services, on all carriers from a single source. Marketers that limit their sales to the services of a few carriers will be unable to serve the wide variety of traveler demands and thus may be unable to compete effectively with outlets that serve the wide variety of traveler demands by holding multiple appointments. For example, most retailers of consumer goods try to offer a broad range of products to improve their chances of satisfying an individual consumer's demand.

In addition, carriers have little incentive to preclude marketers from selling the air transportation of carriers with whom they do not compete. It may even be preferrable to induce marketers to hold other appointments because the possibilities of interline revenues are increased. Although captive dealerships exist in some areas of retailing, it is implausible to suggest that the airline industry will dramatically alter established distribution channels which greatly increase the scope of an individual carrier's sales. A captive retail outlet may generate slightly more revenue on the sponsoring carrier. But the decline in city ticket offices, which promote one carrier's services, suggests that the costs of producing revenue at such locations is greater than the cost of producing revenue if a carrier relies upon travel agent locations. Although individual travel agent locations may produce somewhat less gross revenues for a given carrier than a city ticket office, which are in effect captive outlets, the conference system offers distinct advantages. By allowing carriers to share the cost of their distribution systems, the travel agent programs facilitate sales through a far greater number of outlets and consequently generate far greater total revenue than could be obtained through a captive distribution system.

If only one carrier served a given city or area, there would be a theoretical incentive for that carrier to establish captive marketing outlets. But with our competitive domestic airline system, this is simply not a realistic scenario.

Moreover, substantial use of non-conference marketers will not occur as long as common agents serve as conscientious representatives of their airline principals and provide competent advice to their clients. Only when the inherent cost advantages of the use of common agents are outweighed by excessive commission charges or more effective marketers develop will non-conference marketers become significant marketing alternatives. While IATA argues that the common accreditation system is both efficient and desirable to airline customers, it seems to undercut these views by claiming that the system is so fragile that it will collapse with the first whiff of competition. As our decision discusses at great length, reliance on competition is the preferred policy tool to insure that airline ticket distribution is efficient and satisfies consumer demands.

Finally, IATA fails to recognize that its members will benefit if more efficient marketing alternatives are devised. They will be able to take advantage of innovative marketing techniques other carriers devise and will have the freedom to innovate on their own. Our decision, then, does not place undue burdens on foreign carriers or give U.S. carriers any advantage.

D. Our Distinction between On-line and Interline Exclusivity.

Our decision did not reject all the public benefit arguments raised by the various proponents of exclusivity. We found that there was a limited relationship between the exclusivity provisions and the interline agreements into which carriers have entered with one another. However, we rejected arguments that exclusivity was a prerequisite to carriers' willingness to interline with one another.

Interline agreements generally permit anyone in one air carrier's marketing system to write air transportation on other air carriers that are parties to the agreement. When one carrier's agents write interline tickets on another carrier or carriers, the first carrier protects its interline partners from financial loss. The only injury that interline partners may suffer at the hands of the distributors they have not appointed, because of the interline agreements, is the ill-will that could result from misticketing or other passenger inconveniences that may occur when a marketer is insufficiently familiar with the service he is selling. Because existing interline agreements were entered into with the exclusivity provisions in place, carriers have not had an opportunity to consider the possibility that their interline partners may compensate persons other than accredited agents to market air transportation.

We concluded, however, that this possibility did not warrant indefinite retention of the exclusivity provisions. Interlining carriers can easily protect this limited interest in their interline agreements. To afford air carriers the opportunity to consider making such changes to their agreements, we decided to continue to approve the exclusivity provisions to the extent that they precluded conference members from using and compensating non-conference agents or other persons for writing interline transportation, absent a contrary agreement with its interline partners, for a two-year period. [illegible] exclusivity, to the extent it precluded conference members from [illegible] persons other than accredited agents

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54/ Non conference marketers, such as business travel departments, are given individual carrier stock and write interline transportation at the present time. They merely cannot be compensated for their services. In addition, commuter carriers and their marketers are free to write interline transportation on ATC and IATA carriers.

for selling air transportation entirely on their own services was immediately disapproved. 55/

The proponents argue that our on-line/interline distinction is not workable. IATA, for example, maintains that its interline agreements require carriers to accept interline tickets written by another carrier (or its distributors). As a result, our exclusivity decision allowing carriers the right to use non-accredited agents infringes upon the coequal right to refuse to accept documents from non-accredited agents.

IATA misunderstands our decision. Our exclusivity distinction addressed this very interest. Until December 31, 1984, one air carrier must preclude its non-conference agents or other marketers from writing air transportation on another carrier unless the second carrier has agreed to the use of such non-conference outlet. IATA's insistence that the second carrier will be obligated to accept documents prepared by the first's non-conference outlets, even though it has not given its permission, requires an unlikely sequence of events. The first air carrier will have to be willing to willfully violate conference resolutions, for which infractions the conference may impose penalties. It also assumes that the non-conference outlet will misrepresent itself to the public, selling air transportation it is unauthorized to sell and generate the ill-will that is likely to result. Finally, it assumes that non-conference distributors will write tickets and make reservations for transportation for which they will not be compensated. The carrier that does not choose to use non-accredited agents is, of course, free to accept tickets written by non-accredited distributors, but can refuse to pay commissions upon its portion. 56/

55/ During our discussion of interline agreements at the Sunshine Meeting of December 9, the staff acknowledged that it has no knowledge of the contents of specific interline agreements. Proponents of the agreements have suggested that the staff admission amounts to a confession of ignorance as to the workings of the interline system. They assert that we should delay any action in this case until we have educated ourselves on the interline system. Those parties misinterpret the staff's comments. Our staff deals with the workings of the interline system on a day-to-day basis and is fully congnizant of their essential features. Staff was merely indicating that not all agreements are on file and that it did not presume to be able to say with certainty the extent to which they preclude the use of non-conference marketers. That is the only concern that may be related to this proceeding. Moreover, its concern was that a decision limiting the use, as opposed to compensation, of non-accredited outlets to write interline air transportation would force some persons, particularly BTDs, to lose that privilege.

56/ After the two-year period, or even earlier if carriers modify their interline agreements to address the issue, the rights of acceptance or rejection of non-conference distributor written tickets will be governed by the terms of interline agreements.

ASTA argues our distinction is unworkable because nothing in our order prevents a non-conference marketer from holding himself out as an accredited travel agent. Such distributors are, as a result, free to misrepresent the scope of their authority to the public. Neither the distributor nor the appointing carrier has any incentive to indicate its limited authority.

ASTA's approach is too simplistic. It ignores the fact that accredited travel agents have the means and the incentive to distinguish themselves from other marketers in their advertisements and promotions. Only they can claim accreditation by the conferences and the right to fully represent its membership. If others make such claims, they will be subject to legal actions based on, inter alia, fraud, misrepresentation or violations of the terms of their contract with appointing carriers. Finally, the argument also assumes that the public will not be able to distinguish between accredited and non-accredited outlets, a proposition refuted by the substantial weight of the evidence in this record.

ASTA and IATA also suggest that it was improper for us to distinguish between on-line and interline exclusivity because the distinction was not litigated before the Board. They correctly point out that such a distinction was not raised during the course of the hearing, nor in any of the briefs that were submitted in this case.

What these parties fail to recognize is that we created the distinction in an effort to accommodate their concerns about adverse effects on interlining if we disapproved exclusivity altogether. The issue of the relationship of exclusivity to interlining was argued and briefed at length in this proceeding. Our distinction is based upon the limited character of carriers' interest when another carrier writes its transportation. They now argue that we should not have attempted to fashion a remedy to accommodate that interest. Perhaps their hope is that, confronted with an all or nothing choice, we will approve the exclusivity provisions. We would not. Our finding is that interlining carriers have a very limited interest in knowing who another carrier's marketers are. That interest should be addressed in their interline agreements with other interline partners. Our transition is only meant to afford carriers an opportunity to react to protect their legitimate interests in the interline transaction. 57/

ASTA also asserts that while our decision claims to have approved interline exclusivity, it has actually disapproved it. ASTA reaches this conclusion because our order permits carriers to agree to allow on-line agents to write interline transportation between them.

57/ An air carrier can have no legitimate interest in a competing carrier's decision to authorize on-line sales. Air carriers do not now enjoy antitrust immunity to agree or tacitly collude, either with other carriers or agents, to restrain another carrier's use of unaccredited marketers to sell its own tickets.

ASTA misstates the extent of our approval and misinterprets our intentions in creating the on-line/interline distinction. We approved the exclusivity provisions to the extent that they prohibited interline sales as a precautionary measure that enables carriers to reflect upon and perhaps adjust their procedures when they interline with carriers using non-accredited marketers. Our approval was only until carriers have an opportunity to review their interline agreements in this area, but not beyond December 31, 1984. When an air carrier has made an affirmative decision to accept tickets written by another carrier's non-conference agents, there is no longer any basis for prohibiting that entity from writing an interline ticket. Our distinction was not intended to preserve interline sales for accredited travel agents, as ASTA erroneously assumes.[58]

E. Deferral.

Order 82-12-85 became effective on the date it was served, December 29, 1982. Shortly thereafter, a number of parties sought deferral of its effective date and additional time to file petitions for reconsideration of our decision. They argued that deferral and additional time for petitions were necessary in order for interested persons to formulate their views and and for the conferences to change their resolutions to conform to our decision.

By Order 83-1-57, January 17, 1983, the requests for deferral of our order's effective date were denied. We found deferral to be unnecessary because the order, by its terms, was entirely permissive and did not mandate any changes in the ways that air carriers market their services. We did, however, double the time allotted for parties to file petitions for reconsideration, extending it from January 18th to February 8th.[59]

In their petitions for reconsideration, ASTA, ATC and IATA argue that it was unfair to deny their requests for more time to file petitions for reconsideration and to refuse to defer our order's effective date. Their primary basis for making this claim is that they needed time to conform the conference agreements to our distinction.

There was nothing unfair or prejudicial in the procedures we employed. We merely followed our ordinary practice of approving agreements, with a stated interpretation on how it would be implemented, or with distinct disapprovals applying only to particular sections. Our order carefully delineated the scope of our approvals. To the extent exclusivity was approved, it remains in effect. While interested persons may need to refer to our opinion to learn the limitations of our approval, this is not a unique occurrence. For example, IATA's rules regarding the placement of an agency location on customer premises could, for almost three years, only be understood by reference to one of our orders.[60] No additional action is required by either ATC or IATA to implement our distinction. The submission of a revised resolution, reflecting our decision, is entirely a matter within ATC's and IATA's discretion.

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[58] Indeed, we would expect that given carriers' economic incentives to interline, airlines will probably not elect to forego revenues unless it was convinced that the non-conference marketer were clearly unsuited. Our discussion in this order and Order 82-12-82 presumes that carriers in their negotiations on interline agreements will be concerned only with protecting their legitimate business interests. We certainly do not intend to imply that airlines are free to use interline agreements as a vehicle to coerce or restrain the competitive options of their interline partners.

[59] By Order 83-1-97, January 26, 1983 we denied subsequent requests for deferral of the order's effective date and still more time for filing petitions for reconsideration.

More important, our preference is that the next two years be used by air carriers to modify their interline agreements to address the possible use of non-conference agents. We did not contemplate that it would be a time for the conferences to reach industrywide conclusions on the rules under which non-accredited agents may operate. While some joint decisions may be useful, conference action should not unnecessarily infringe upon individual carrier prerogatives. In short, we reject the underlying notion that the conferences need time to figure out how to regulate on-line agents.

There is no merit to the assertion that our decisions to merely double the time for petitions for reconsideration and not to defer our order's effective date somehow denied parties their due process rights. We have provided parties with all the rights attendant to an adjudicatory proceeding. An extensive record was developed and a decision issued that is supported by the weight of evidence in that record. In all respects our actions were in accordance with the Administrative Procedural Act and our procedural rules.[61] After nearly three and a half years, we have every reason to reject attempts to further delay this proceeding.

The last point to be made is that our decision does not require carriers to otherwise modify their marketing systems. In fact, we found that significant changes are not likely to occur soon, given the benefits of using conference agents. It is likely, therefore, that we could have immediately disapproved exclusivity, in its entirety, without adverse effects. It is only out of an abundance of caution that we allotted time for a transition before removal of the exclusivity provisions.

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[60] See Ruggiero (IATA) 57 Tr. 15-21 and Order 80-7-112 at 6, July 17, 1980.

[61] Our procedural rules provide for 20 days for filing petitions for reconsideration. We afforded parties 41. Those rules also provide that petitions for reconsideration do not stay the effectiveness of our decision. 14 CFR §302.37.

F. Our Distinction Is Not Necessary.

Our distinction between on-line and interline sales is also criticized by NPTA as being unnecessary. 62/ In its view, interline exclusivity should be disapproved immediately because interline agreements already exist between the airlines and it would be a simple matter for carriers to modify these agreements.

As we have already indicated, our action is designed to facilitate a transition. While we tend to agree with NPTA that the modifications, if any, to individual interline agreements should be a relatively simple task, we prefer to give carriers ample time to undertake that task. Moreover, NPTA seems to believe that we desire to promote compensation of BTD's to redress a competitive imbalance. However, we do not necessarily regard this outcome as necessary or, for that matter, desirable such that we should skew our decision to promote a particular private interest. Rather, we seek only to permit greater competitive freedom. We are not trying to predict or influence carrier business judgments by forcing precipitous changes.

G. Dual Status.

In its petition, American Express requests that we clarify whether our action on exclusivity permits persons holding accredited agency status to also reach special agreements with individual air carriers so they may act in an "on-line only" agent capacity. It believes that was our intention, citing our desire to increase the potential for innovation and efficiency improvements in the air transportation industry and our statements that travel agents would be in the forefront of innovations likely to take place. American Express acknowledges, however, that some safeguards may be required. DOJ and BDA have indicated their support of the American Express request.

IATA, ATC and ATN oppose American Express' request. These parties all argue that our order contemplated that potential entry into the marketing industry would come from persons other than conference agents. They cite passages of our order that appear to support this conclusion. If we permit agents to hold dual statuses, it will, in their view, allow agents, particularly large agents, to bargain down the selection criteria for conference accredited agents.

62/ ASTA points out that NPTA's petition for reconsideration exceeds the page limitations of our rules. Unlike ASTA, which also filed a petition which is excessive, NPTA has not sought permission to file a longer petition. IATA asks that the entire petition be stricken because it raises matters that occurred after the issuance of our order. Specifically, it includes letters sent to NPTA members by various air carriers indicating their unwillingness to enter into on-line agent relationships at the present time. If the petition is not stricken, IATA demands the right to cross-examine the preparers of the letters. We will waive our page limitations, as we have done previously to accommodate other parties, including ASTA and IATA. However, NPTA is on notice that we do not ascribe any weight to its post-decision evidence.

We clearly contemplated that owners of conference agencies should have the freedom to take advantage of the opportunity to deal directly with air carriers. Existing marketers are obviously in the best position to find opportunities to innovate in the marketing industry. If such persons cannot take advantage of new ideas they develop and opportunities are foreclosed to them, one of the major forces for increased efficiency in air transportation marketing will be curtailed, if not eliminated. In fact, one of our reasons for disapproving exclusivity was the fact that it created a commonality of interest among agents and chilled their incentives to innovate.

The benefits of the common accreditation system will not be threatened by the possibility of persons holding dual statuses. Rather, it will, as IATA and ATC suggest, put pressure on the conferences to place no greater a restraint on competition than is necessary to attain its benefits. In this regard, it should be remembered that we indicated that the conference standards may be more rigorous than is necessary to accomplish their objectives. Agents will only want to enter into arrangements outside the conferences when they believe existing standards are unduly restrictive. We regard the potential for operations under the different standards as a welcome competitive spur to encourage the conferences not to adopt overly broad or unnecessary standards on persons wishing to become common agents. Market forces, then, will assume the role we have traditionally performed, by insuring that carriers do not use their collective economic power to place unreasonable burdens on their agents.

We encountered much the same argument in the IATA Commissions proceeding. There it was argued that only larger agents would be able to negotiate higher commissions, while smaller agents would not, and that the smaller agents would therefore be unable to compete. We noted that this was unlikely to occur because the industry is not highly capital intensive, there seemed to be significant competition as between agents, and the number of agents was continuing to grow at a strong rate. [63]

We have no reason to believe that American Express' size will give it a bargaining advantage that it may translate into the power to become one of only a few competitors in the air transportation marketing industry or the power to force other agents out of business. American Express currently owns some 125 outlets out of the more than 20,000 agency locations. [64] While this position probably gives it far more bargaining power, in its dealings with air carriers than most other agents, that does not mean American Express will be able to obtain advantages that other agents will not be able to secure.

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[63] Order 78-8-87 at 17-18, October 11, 1978.

[64] Daly (American Express) 66 Tr. 11. In addition, some 350 travel agent locations are American Express representatives. These agencies are independently owned, but have entered into contractual arrangements with American Express to provide travel services under its name. 66 Tr. 12.

What has occurred since fixed commission agreements were disapproved was that all agents both large and small have benefited from generally rising commission rates. Other agents may benefit from any ability American Express has to negotiate revised conference standards. Of course, other agents are free to enter into cooperative working arrangements in an effort to duplicate any advantage American Express may have.

Even if we were to assume that our decision would give some advantage to American Express along these lines, it is unlikely that the public would be harmed. No one has suggested how consumers might be adversely affected. On the contrary, if there are economies in the agent industry, changes reflecting those economies could produce efficiencies benefiting the industry and the public.

IATA, ATC and ATM are also concerned that the possibility of agents holding dual status will practically eliminate agents' ability to protect their interests in the concepts of "accredited travel agent" and "approved travel agency," and that public confusion will occur. In addition, if a single owner receives standard ticket stock for its approved locations and interline restricted documents for its unapproved agency locations, it will use only the standard stock. In their view, carriers will be unable to prevent such abuses.

There is some merit to these concerns. However, such concerns do not warrant a prohibition on dual status agents. Some limitations on a single location operating under dual status would appear to adequately address them. If a single location could be denominated both a conference and a non-conference agency, without any distinctions, it may be difficult to distinguish between transactions handled there. In addition, there may be a possibility of public confusion if the same or similar trade names are used in both accredited and non-accredited operations. The conferences should carefully consider whether this will occur before adopting restrictions in this area. It would appear to be reasonable, therefore, for the conferences to craft rules to maintain the distinction for their authorized locations and trade names. [65]

A set of reasonable rules will also go a long way toward eliminating the potential problems of public confusion, and protecting interlining carriers' interests in knowing who is writing their air transportation. In any event, the conference can invoke their sanctions for unauthorized use of travel documents. In addition, the burden may be placed upon their member carriers to insure that agents do not misuse their dual status.

However, we want to caution ATC and IATA that the Conferences have a very limited interest in the non-conference activities of agencies holding dual statuses. They could not, for example, establish location standards for non-conference locations. Their interest only extends to insuring that conference activities are conducted in accordance with their accreditation and retention standards. Of course, some standards may be imposed as a condition to providing access to the Area Settlement Plan.

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[65] In some cases, participants in a joint venture, particularly one that has market power, must have the freedom to simultaneously deal outside the joint venture. However, the joint ventures are generally entitled to enforce uniform standards upon activities conducted within their frameworks. See Order 82-12-85 at 54, n.185.

There is no reason to defer action on American Express' request, as ASTA asks. As we have noted, the possibility of agents holding dual statuses was contemplated in our decision. Moreover, we believe it would place an unreasonable burden on agents to deny them the freedoms we have given other persons to operate outside the conference systems.

OTHER REQUESTS FOR MODIFICATION OF PASSENGER AGREEMENTS

NPTA opposes our decision to continue to approve the provisions that prohibit business travel departments (BTDs) and other large purchasers of air transportation from becoming conference agents.[66] We found that these provisions may tend to lessen competition and may tend to lessen the benefits of the common accreditation systems. We concluded, however, that persons who do not wish to become accredited agents would do so if these provisions were immediately disapproved. We decided, therefore, to approve the provisions for a two-year period. In the interim, other regulatory changes we have already taken would probably begin to be felt in the industry and the possibility of distortions to the agency systems would be eliminated.

NPTA argues that these provisions should be disapproved immediately. It indicates that, based on past experience, increased competition will not occur unless we mandate change.

NPTA has raised no arguments we have not already considered. Its requests are aimed at forcing air carriers to compensate BTD's for the tickets they write. This is fundamentally an economic decision between individual corporation purchasers and air carriers. Our decision provides them with an immediate mechanism to pursue their interests. Moreover, even after December 31, 1984, air carriers will still be free to deny any approved agent its appointment.

IATA challenges our decision to require it to allow its agents to reimburse customers when they share employees or the customer otherwise performs services for or bears costs normally borne by the agents.[67] We will affirm our decision.

IATA argues that we must first specify in detail what customer provided services and/or facilities may be used as a cost basis for commission offsets. We need not consider every conceivable possibility at this time. We have already concluded that cost sharing is permissible for certain activities, *i.e.*, shared employees, rent for space used and utilities. Those were the areas in which we will require IATA to permit cost reimbursement. We will address others should they arise.

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[66] The most important of these are the rule that prevent any person that does more than 20% of its business with itself from becoming a common agent and the rule that prohibits the payment of commissions on tickets an accredited agent writes for his own use, except in unusual circumstances.

[67] Order 82-12-85 at 90.

IATA also argues that we must first consult with foreign governments to assure that cost reimbursements are permissible under the rate articles of various bilateral agreements. There is no basis for this assertion. We have elsewhere approved a number of cost reimbursement mechanisms in international air transportation. [68] Our reasoning for disapproval was that compensation for commercial services rendered to an agent by the customer do not necessarily constitute rebates. We do not believe that foreign governments must be involved in a question of legal interpretation of our statutes.

CARGO AGREEMENTS

IATA criticizes our decision to disapprove the cargo agency exclusivity provisions. IATA notes that we found that there is a wider variety of ways carriers have goods prepared for shipment and through which they sell their cargo services and that we concluded that these alternatives provide an effective disciplining force on IATA accredited cargo agents. Nevertheless, we disapproved the provision because it may deny some conference members the use of alternate marketers, just like the exclusivity provisions of the passenger agency program. It asserts our finding was based on conclusions about exclusivity in another market.

IATA's argument overstates a crucial finding and misinterprets our comparison of the passenger and cargo programs. We found that the cargo exclusivity provisions had been less effective in restraining competition, not that they did not restrain competition. [69] Our reference to the passenger programs was to point out the adverse economic consequences of an agreement denying competitive alternatives and the legal basis for disapproval of such an agreement. We then found that the same adverse effects that required disapproval of passenger agency exclusivity -- the inhibition of potential entry of new forms of distribution -- were at work with the cargo agency exclusivity provisions. [70]

IAAA asks that we clarify the extent to which agents are to be liable under Resolution 833 for misquoting rates or other actions. IAAA interprets the Initial Decision to recommend that proof that a cargo agent took reasonable steps to obtain rate information should be a defense to allegations of a violation of that resolution. IAAA argues that to require that agents make "every effort," as our decision does, places too great a burden on agents.

We agree. To require "every effort" is tantamount to imposing absolute liability on the agent. It suggests that the agent must exhaust every conceivable means of obtaining fare information. Only reasonable effort should be required of the agent. The opinion and order should be modified to reflect this change.

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[68] See *e.g.*, 14 CFR §399.864 and §223.2(k).

[69] Order 82-12-85 at 115.

[70] *Id.*

IAAA also asks that we clarify the meaning of the phase "commercial dispute" as it is used in referring to provisions of the resolutions covering the settlement of disputes or adjustments of accounts as between an agent and an airline. IAAA asks us to adopt a broad definition of the term, so that it will encompass disputes between carriers and agents relating to the current report and sales period, as well as prior reports and periods. IATA's witness apparently limited his definition of the term so that it would apply only to the current report and sales period. [71] IATA has apparently agreed to IAAA's definition. [72] We will, therefore, grant IAAA's request.

ANTITRUST IMMUNITY

A. Mandatory Immunity.

As we indicated above, IATA and ASTA believe that antitrust immunity must be conferred upon the agreements we have approved. Their view is based upon their interpretation of how §412 must be applied: i.e., antitrust concerns trigger a balancing of the agreements' benefits, of any kind, against the identifiable alternatives to achieving those benefits. [73] Whenever the balancing analysis has been "triggered" we will, therefore, be analyzing an agreement under subsection 412(a)(2)(A)(i). Section 414 provides that whenever an agreement is approved under that subsection, we must exempt any person affected by the agreement from the operation of the antitrust laws.

We have already offered a number of reasons why IATA's interpretation of §412 must be rejected. Some additional observations are necessary, however. If we interpreted §412 as IATA suggests and did not attempt to focus on competitive effects in our initial analysis, we could not reach a reasonable conclusion as to whether an agreement before us may substantially reduce competition. In turn, we would not be able to assess whether antitrust immunity would be necessary in order for the agreement to go forward. Procompetitive agreements that would be permitted under the antitrust laws would have to be granted antitrust immunity in virtually every case.

Moreover, IATA's approach creates perverse incentives. To insure that an agreement raises antitrust concerns, and receives antitrust immunity, it will be formulated to restrain competition in some way.

B. Discretionary Immunity

A number of parties argue that we should, in any event, grant antitrust immunity on the grounds that it is required by the public interest. IATA and ATN, for example, argue that it is required because without it the programs will not continue. In their view, carriers will abandon the programs as soon as immunity is withdrawn because of the fear of antitrust lawsuits against the programs and their members.

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[71] See Lindsay (IATA) 89 Tr. 53, 54.

[72] Bailey (IATA) 2 O.A. Tr. 235-236.

[73] IATA Petition at 8.

Throughout this proceeding, there has been a shared perception that most aspects of the programs are on balance procompetitive, so that there will be no substantive basis for antitrust challenge. The fear, however, is that antitrust lawyers will bring frivolous lawsuits against the program. IATA cites the fact that NPTA has indicated it would have sued the conferences had we not granted them antitrust immunity for a two year period. In IATA's view, this indicates how wrong we were in minimizing the threat of frivolous lawsuits.

The problem with IATA's argument is that the provisions NPTA says it would have challenged as being anticompetitive 74/ we found may be anticompetitive. They were approved, for a limited time, to meet transportation needs. In such circumstances, antitrust immunity is mandatory. NPTA has not threatened suit on the basic programs which we found may be procompetitive. Similarly, DOJ has indicated that it would not challenge a common accreditation program that was cleansed of features to which it objected, the most notable of these being the exclusivity provisions.

There is no basis for the argument that antitrust immunity is necessary for the agreements to continue. Air carriers will not be willing to abandon the benefits of the common accreditation programs and the ASP because of the cost of defending themselves against frivolous lawsuits. They will, however, have an incentive to make sure that the standards themselves and carrier discussions in the context of their joint efforts do not deviate into unlawful conduct. We regard the threat of lawsuits as a positive feature of our decision. Antitrust lawsuits are a normal facet of doing business in an unregulated environment. While frivolous lawsuits impose some costs, Congress has made a judgment, and we agree, that our society is better served by a system that is concerned primarily with dealing with occasional lapses in competitive behavior than in pervasive regulation and review. The possibility of some misguided lawsuits against the programs does not justify the exercise of our extraordinary power to confer antitrust immunity upon these agreements for an indefinite period.

IATA's principal argument is that our decision to withdraw antitrust immunity is unacceptable to foreign governments. There is a measure of bullying in IATA's pleading. It speculates that if immunity is withdrawn foreign governments will consider the need to retaliate against U.S. carrier marketing operations in their countries. They do not argue, however, that our decision will have extraterritorial effects, or will

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74/NPTA seeks to challenge "the same anticompetitive elements the Board has noted": i.e., the 20% rule and the common control rule. NPTA Petition at 19-20.

result in preferential treatment for U.S. carriers. 75/ Rather, IATA demands that we substitute its judgment for our own. We fully appreciate the fact that many foreign governments do not favor the application of antitrust laws. But to concur with IATA's argument would permit foreign governments to apply their laws and policies extraterritorially in the U.S. As we have indicated elsewhere, IATA's contention that the U.S. cannot apply its own antitrust legislation to sales within the U.S. territory of air transportation is both unreasonable and unacceptable. 76/ We reassert that conclusion here.

IATA argues that conferral of immunity is necessary to assure foreign governments that the U.S. is committed to providing equal access to agency locations now assured by these programs.

The initial point to be made is that we have approved the common accreditation programs. In that sense we are fully committed to the programs. The removal of antitrust immunity only means that the programs must operate in accordance with U.S. antitrust laws and are subject to court rather than CAB review. These are not unusual obligations for foreign enterprises. Foreign producers in virtually every other industry engage in marketing competition within the U.S. without protection from U.S. antitrust laws.

Further, IATA's statement that our decision casts doubt on our commitment to equal access to the agency programs confuses different concepts. Fair and equal access, as the term is used in bilateral agreements, refers to opportunity for foreign carriers to attract potential passenger traffic in the U.S. market. It does not define the ways in which carriers, having been given access to a market, must market their services. In this regard, the conference agreements were developed because individual carriers believed them to be in their economic interest. They could be abandoned tomorrow, and we could not prevent it. We are, of course, convinced that international carriers will continue to have access to a system of common agents even though the scheme of market regulation may not be as familiar as Board intervention. Finally, the Board is fully committed to complying with international obligations incurred by the United States. In the event that any foreign carrier is denied fair and equal access to the U.S. market, we have ample authority to fashion an appropriate remedy.

75/ IATA's arguments are all the more ironic in light of problems of preferential access to marketing systems that U.S. flag carriers have encountered in some foreign countries. See ATC-IR-118.

76/ ER-1246 at 11, September 22, 1981, 46 FR 46787 and Order 81-11-58 at 5, November 10, 1981. See also Sumitomo Shoji America, Inc. v. Avagliano, ___ U.S. ___, 102 S.Ct. 2374, 2381 (1982), where the Court found that the purpose of a treaty was not to give foreign companies greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage.

C. Three Year Immunity

IATA, ATC, ARTA and ASTA ask us to grant antitrust immunity to the conference programs for a three year period in order to allow the Board's successor to re-examine the issue of whether indefinite antitrust immunity should be granted the programs. They argue that if immunity is not extended for an additional year there will be a period during which the agreements will be without antitrust immunity while they seek indefinite immunity. 77/

As DOJ points out, this line of argument is based upon the parties' own refusal to accept our decision. Our decision was not to preserve antitrust immunity, but to eliminate it. Rather than accept this, they ask that we pass on the final decision to DOJ or other successor to our §414 powers. In reality, of course, we are not merely stewards of section 412 for DOJ.

More important, acceding to their requests would undercut the Board's objective to achieve a transition to a less-regulated regime. Our purpose, then, for granting immunity to the programs in the first place -- to afford carriers an opportunity to make additional modifications they believe are desirable -- would be frustrated. Consequently, we will deny the various requests that antitrust immunity be granted for a three-year period.

D. Transitional Immunity is not Necessary

NPTA also challenges our disposition of the immunity issue. It argues that the Airline Deregulation Act mandates that we place maximum reliance on competition, which in this case means that antitrust immunity must be withdrawn immediately. In its view, we lack the power to grant antitrust immunity for a transitional period.

This view is unsupportable. Section 414, by its terms, allows us to tailor our grant of immunity. Specifically, we have the discretion to grant antitrust immunity only as necessary to allow the transaction to proceed. This statutory language gives us the necessary regulatory flexibility to limit both the scope and duration of the immunity granted to the particular circumstances in a given case.

NPTA also repeats the argument that carriers will not act competitively unless we force them to do so, in this circumstance by withdrawing antitrust immunity. Its arguments, however, are based entirely upon whether or not BTD's receive compensation for providing ticketing and

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77/ There is an implicit assumption in the argument that future filings will not stay the effect of our decision. That view is correct. Absent further order, the effectiveness of Order 82-12-85 will not be stayed by the filing of any document in which persons request that antitrust immunity be continued beyond December 31, 1984 or that approvals that expire on that day be extended.

reservations services. NPTA fails to recognize our often repeated conclusion that the decision on whether or not to compensate BTD's is basically an economic one that must be left to individual air carrier prerogatives.

SUNSHINE ACT ALLEGATIONS

ASTA and IATA also challenge our decision on the grounds that it was made in violation of the Government in the Sunshine Act. [78] That Act provides that deliberations that determine or result in the joint conduct or disposition of official agency business shall be open to public observation unless an exemption applies.

ASTA maintains that information disclosed at our sunshine meeting of December 9 and under the Freedom of Information Act reveals that our decision in this case was actually reached prior to December 9. It asserts that the major issues in this case were decided in a series of meetings between one or two Board members and our advisory staff. The open meeting of December 9 was held only to "rubber stamp" decisions that had already been made. In its view, were this not the case, staff could not have sent us a nearly complete 140 page opinion written in a matter of a few days.[79]

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[78] 5 U.S.C. §552b.

ASTA's arguments are founded upon documents, released to the public, that indicate that at least nineteen meetings were held, between late August 1982 and December 9, between one or two Board members and advisory staff dealing with this proceeding. ASTA recognizes that in order for a meeting to be covered by the Sunshine Act, a gathering must include "at least the number of individual agency members required to take action on behalf of the agency."[80] None of the 19 meetings involved a quorum of the Board members. Thus, the meetings were permitted by the Act's terms. ASTA nevertheless, argues that the spirit of the Act is violated if a series of meetings takes place at which the substantive issues are decided.

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[79] ASTA also asserts that our Office of the General Counsel was attacking the position of supporters of the agency agreements weeks before the I.D. in this case was issued. It cites a portion of the "For Information" memorandum of May 12, 1982 (See footnote 4, supra) that suggests that one of the parties' legal arguments should not be allowed to divert us from our purposes in instituting this case. The staff document gave as an example the argument that we cannot examine portions of an agreement or condition our approval. Our powers to review individual provisions or to grant approval subject to condition have been settled for 35 years and been approved by the courts. Staff merely indicated that there was no legal merit to the arguments. This opinion was offered at the end of a document that faithfully summarized the parties' arguments. So the issue is not whether this was the only information before the us; the gravaman of ASTA's complaint is that our staff in its role as our legal counsel offered an opinion on the quality of the legal arguments presented in this case. The administrative decisionmaking process would be greatly hindered if staff were barred from offering its assessment of the issues, particularly on legal questions.

ASTA also seems to suggest there was some staff impropriety in monitoring this proceeding and submitting memoranda prior to the release of the judge's recommendations. We have found, however, that this process, especially in complex cases -- this one involved approximately 40,000 pages of testimony, exhibits and information responses -- facilitates the decisionmaking process. Review of the contents of the record and parties' arguments while a proceeding is still before the administrative law judge eliminates a frequent cause of delay in the administrative process. There is nothing prejudicial to parties' interests in simultaneously educating ourselves with the record in a hearing case.

[80] 4 U.S.C. §552b(a)(2)(1976).

As ASTA recognizes, we are entitled to consult with our staff prior to holding public meetings.[81] Nothing in the Sunshine Act requires that our consultations with staff be open to the public. Informal meetings are held to educate and inform us of the issues raised in particular proceeding. In addition, such meetings allow us to individually engage in a frank and candid discussion with staff. We can freely discuss alternate ways of deciding a given issue and obtain staff input on its likely consequences. In fact, a number of different proposals were suggested at these meetings. Had these discussions with staff been open to the public, significant public confusion would have resulted because ideas and tentative proposals, offered for staff consideration, would be interpreted by persons observing the meetings as our final position. Oftentimes, staff assessment of our ideas, particularly the likely impact on the industry, required additional research, staff level discussions, and subsequent meetings for further discussion and refinement.

The Sunshine Act protects this process. The Senate Report on the Sunshine Act provided that "[i]t is not the intent of the bill to prevent any two agency members, regardless of agency size, from engaging in informal background discussions which clarify issues and expose varying views."[82] This is also reflected in the language of the Act itself. The Sunshine *Act* defines a "meeting" as "the deliberations" of a quorum of members "where such deliberations determine or result in the joint conduct or disposition of official agency business." Discussions which are intended to clarify issues are not "deliberations" within the normal meaning of the term[83] and do not result in the conduct or disposition of agency business.[84] Of course, where less than a quorum of agency members is present, and there has been no delegation of responsibility for such lesser number of persons to act on the agency's behalf, there could be no conduct or disposition of agency business at the meeting even if deliberations occurred.

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[81] ASTA Petition at 8. *See Braniff Airways v. CAB*, 379 F.2d 453, 461 (D.C. Cir. 1967); *Montrose Chemical Co. v. Train*, 491 F.2d 63 (D.C. Cir. 1974); *Graham v. NTSB*, 530 F.2d 317 (8th Cir. 1978) and *Texas International-National Acquisition Case*, Order 79-3-152 at 20, March 3, 1979.

[82] S. Rep. No. 354, 94th Cong., 1st Sess. at 19 (1975). Because the passage refers to informal discussions between two members of a three-member agency, the passage exempts this type of discussion even among a quorum of members. *ITT World Communications Inc. v. FCC*, No. 80-0428 at 46 n.163 (D.C. Cir. Decided February 1, 1983).

[83] To deliberate means to consider reasons for and against a thing in order to make up one's mind. Webster's New World Dictionary, College Edition 1968.

[84] It is well established that Congress intended to permit agency members to act on agency business that is circulated to them "sequentially in writing." *Communications Systems, Inc v. FCC*, 595 F.2d 797, 800 (D.C. Cir. 1978). *See also* Order 82-11-109 at 9, November 22, 1982.

ASTA apparently believes that the number of meetings held in this case suggests a deliberate effort to evade the requirements of the Sunshine Act. There is no truth to its suggestion. As ASTA must acknowledge, this is one of the most complex and difficult cases ever to come before us. The proceedings were in progress for nearly three and a half years. Almost 40,000 pages of testimony, exhibits and information responses have been submitted for the record.[85] The Initial Decision in this case was 213 pages in length, without appendices. The number of meetings only reflects the scope of the issues presented.

Moreover, ASTA does not recognize that ten of the nineteen staff meetings occurred on or before September 15 and 16, when oral argument was held in this case. Those meetings were held to prepare us for the task of questioning attorneys who have been deeply immersed in the issues of this case since its inception. Because of the extensive effort that staff undertook to prepare us for oral argument, a lively and lengthy argument lasting two full business days was held.

The meetings between staff and individual members held between the oral argument and December 1, 1982, were not held for the purpose or with the result of avoiding the requirements of the Sunshine Act. The meetings were held in order to consult with staff on the issues. If we were to adopt the logic of ASTA's position, we would be barred from discussing any issue with staff outside of a sunshine act meeting. It therefore borders on the absurd to suggest that we cannot individually consider the issues, especially in a proceeding of this magnitude, until it appears on the calendar of an open meeting.[86] We have complied with both the letter and spirit of the Sunshine Act because the deliberative process -- the process of formulating a consensus by exchanging views -- occurred in a public forum.

There is no basis for the contention that we made up our minds in the series of meetings with the staff and that the open meetings were just a replay, for public consumption, of decisions that had already been made. The transcripts of the meetings held on December 9 and 16 reveal a lively discussion on all the important issues. Moreover, the entire meetings were taken up with the process of formulating our consensus on how to dispose of those issues.[87] Our efforts to formulate a consensus are apparent with any objective reading of the transcript.[88] The fragility of our consensus is aptly demonstrated by the fact that the final disposition of major substantive issues remained unresolved on December 16 when we were considering the draft opinion submitted by staff. All issues were finally resolved after a lengthy recess to allow staff to make substantial revisions to the draft's disposition of important issues. The diversity of opinion on the issues in this case is also demonstrated by the fact that four members submitted separate statements indicating their disagreement with various portions of the collective final decision.

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[85] The number of issues presented in this case is demonstrated by the fact that our staff prepared six memoranda, totaling seventy single spaced pages, setting out the various issues raised and arguments by the parties. Subsequent memos, providing information on the Initial Decision, subsequent briefs and staff analysis, totaled 113 pages.

[86] In this case, more than 35 hours of discussions were held with staff in the 19 meetings alone, in addition to the almost five hours of Sunshine Meetings that were held.

ASTA also draws the inference that we decided the issues in this case prior to the meeting of December 9 from the fact that our staff was able to produce a nearly complete 140 page draft opinion in a matter of a few days. While ASTA acknowledges that there would be nothing improper in beginning to prepare an opinion before deliberations occur, it insists that only non-substantive portions may be begun.[89]

As we have indicated, however, the deliberative process did not begin until December 9. Staff began circulating portions of its drafts for our review the following day. We were not reviewing their work product prior to that time. There is no suggestion, therefore, that any portion of our opinion was adopted, even informally, prior to December 9. Rather, ASTA's argument is that staff must have had a good idea how the issues would be resolved because such a long draft was done so quickly.

There is nothing unusual or improper in staff beginning preparation of draft opinions and orders prior to our addressing those issues in a sunshine meeting. Most items that appear on the calendars of Board meetings are prepared by staff on the basis of their own assessment of the likely outcome of our deliberations. All documents prepared before December 9 were, in the same way, the consequence of staff initiative. But this practice does not obligate us to adopt staff recommendations. We frequently alter substantial portions of such draft documents submitted to us. In fact, that is what occurred in this case. Material portions of the staff draft were altered prior to the adoption of a decision.

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[87] Admittedly, there is no recital of the facts of the case, or other background discussion. However, as noted above, we do not interpret the Sunshine Act to require that individual members can consider issues only in an open meeting.

[88] Our response to ASTA's FOIA request also suggests the absence of a consensus, prior to the meeting of December 9, by the fact that there was a continuous stream of meetings and memoranda to the Board until that date.

[89] On March 22, 1983 ASTA filed a Motion for Leave to File a Supplement to its Answer to Petitions for Reconsideration. Attached to its motion are two staff drafts of the final order in this proceeding. They are submitted to support its argument that a virtually complete order was prepared prior to December 9, 1982. We will grant ASTA's motion. Of course, its submission merely represents argument, not evidence.

The Board desired to decide the case before the end of the year, as was discussed at the meetings. 90/ Our staff cannot be faulted for making every effort to complete the decision within that period. 91/

Finally, the remedy ASTA suggests is unsupported by case law, even if it were correct on Sunshine violations. In ASTA's view, we must vacate our decision. Moreover, it maintains that since these alleged procedural errors cannot be remedied by subsequent proceedings, we should adopt the decision of the administrative law judge.

Sunshine Act violations do not provide an automatic basis for a reversal of an agency's substantive decision. 92/ The usual remedy for Sunshine Act violations is the release of transcripts of the meetings that were held. Since no transcripts of the meetings held with staff were made, other relief, such as additional procedures, might be warranted. A finding that the Sunshine Act was violated would not, however, be a basis for adopting recommendations we have found to be unsound and injurious to the public.

ACCORDINGLY:

1. We grant the Petitions for Reconsideration of the Air Traffic Conference of America, American Express Company, the American Society of Travel Agents, Associated Travel Nationwide, the Association of Retail Travel Agents, the International Air Transport Association, the International Airforwarder and Agents Association and the National Passenger Traffic Association;

2. We deny the various requests that we modify Order 81-12-85 of ATC, ASTA, ATN, ARTA, IATA and NPTA;

3. We grant the requests of American Express and IAAA that we clarify Order 82-12-85 to the extent set out above;

4. We grant the motions of ASTA and IATA to expand the page limitations of our procedural rules in petitions for reconsideration;

5. We grant, sua sponte, waiver of page limits for NPTA's petition;

90/ See Transcripts of Sunshine Meetings attached to ASTA Motion to Exceed Page Limitations, Transcript of December 9 meeting at 115-17 and Transcript of December 16 meeting at 74-75.

91/ We should point out that there was some consideration given to placing the proceeding on the calendar items to be considered at the sunshine meetings of November 4, 1982 and November 18, 1982. However, Member Gloria Schaffer was unable to attend the former and Member James Smith to attend the later. Therefore, consideration of the issues was postponed to the next scheduled meeting.

92/ Pan American World Airways v. CAB, 684 F.2d 31, 36 (D.C. Cir. 1982).

6. We grant ASTA's Motion for Leave to File a Supplement to its Answer to Petitions for Reconsideration; and

7. Except to the extent granted, all other petitions, applications, motions and other requests are denied.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Secretary

(SEAL)

All Members concurred except Member Schaffer who concurred in part and dissented in part. Member Bailey filed the attached concurring statement. Member Schaffer filed the attached concurring in part and dissenting in part statement.

BAILEY, MEMBER, CONCURRING:

While we have given the conferences the flexibility to consider further restrictions on dual status locations and use of tradenames, I cannot agree with broad prohibitions on travel agents' businesses. Consistent with the thrust of our entire approach in this case, I contemplate that any agreement would be scrutinized to ensure that restrictions in these areas were reasonably related to the purposes of the conference program and no more restrictive than necessary to achieve legitimate conference goals.

While the Board's earlier order clearly envisioned that the conferences could develop and protect a distinguishing trademark or symbol for conference agents, we have not had an opportunity to consider whether the use of a corporate trademark should be regulated by the conferences. It seems to me that if dual status agents are allowed to display a conference trademark only at an accredited location, consumers will not be misled if they choose to deal with an unaccredited location bearing a corporate tradename in which they have confidence. While the Board is open to argument on this issue, I think that the conferences should devote their energies to developing a distinctive trademark for accredited locations rather than attempting to regulate the use of corporate tradenames or logos.

/S/ ELIZABETH E. BAILEY

SCHAFFER, MEMBER, CONCURRING IN PART, DISSENTING IN PART:

In my statement accompanying Order 82-12-85, I explained why I was opposed to the modifications which the majority imposed on the ATC and IATA conference systems. In light of the petitions for reconsideration of that decision, I remain convinced that the record in the Marketing Case does not support the majority's decision, and I favor restoration of the agency exclusivity and BTD provisions, as well as the antitrust immunity which the agreements have historically enjoyed.

I regret that the Board, in its failure to undertake a comprehensive reconsideration of its decision in the Marketing Case, has lost its last opportunity to insure that the system by which air transportation is marketed remains efficient and responsive to both carriers and consumers.

Although I disagree with much of the majority's decision in this case, I fully concur that the procedures by which it was reached were both fair and in conformance with our rules. The Board's action was based strictly on the record compiled in this complex case and no decisions were made prior to the public meetings. I believe that this decision fully exemplifies the integrity of the Board's decision-making process.

With regard to the issue of "dual-status" agents which was raised by American Express, I believe that the conferences should be permitted to adopt rules which would prohibit accredited agents from performing non-accredited services at the same location. I also believe that the conferences should have the ability to restrict the use of the same or similar trade names in both components of a dual-agency operation.

I believe that in both of these areas there exists great potential for public confusion. The ability of the consumer to make an informed and intelligent choice between the services of accredited and non-accredited agents directly depends on the ability of the consumer to know who he is dealing with at any given time. Dual-operations in the same location or with similar trade names would, in my opinion, render the consumer's freedom of choice virtually meaningless.

/S/GLORIA SCHAFFER

CIVIL AERONAUTICS BOARD
WASHINGTON, D.C. 20428

IN REPLY REFER TO: B-1-35

APR 15 1983

Honorable James J. Howard
Chairman
Committee on Public Works and Transportation
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The Board has reviewed H.R. 2053, the Air Travellers Security Act of 1983, as you asked. The Board strongly recommends that this bill not be passed.

This bill is an unprecedented effort to substitute the opinion of an Administrative Law Judge for that of Board Members, who are appointed by the President and confirmed by the Senate. It goes far beyond merely vetoing an agency rule. The bill in effect decides a case involving the competing interests of private parties that has been adjudicated under the Administrative Procedure Act.

We believe our decision to be correct, based on the facts in the record of this case and on the laws enacted by Congress for regulation of the aviation industry and application of the antitrust laws. The record of the case covered 40,000 pages of testimony and exhibits. The case itself took more than 3 years from beginning to end. The Board thoroughly reviewed the record, heard oral argument, and carefully analyzed the law before reaching its decision. Because of requests by certain parties, we recently reviewed our decision. We affirmed our original decision with some minor changes, since no new evidence was submitted.

Because the Board's decision is 137 pages long, let me briefly summarize it for you, explaining why we believe it to be the correct and reasonable decision based on the record, and why it should not be vacated or replaced by the Administrative Law Judge's opinion. The major parts of the decision are:

--The basic framework of the existing travel agent accreditation rules is approved very much as it now stands. This means that the various competency, honesty, and financial requirements for becoming an accredited travel agent will continue to apply much as before.

--The ability of air carriers acting in unison to prevent a carrier from selling its tickets through means other than accredited travel agents for travel on that airline alone (on-line) is immediately eliminated. That same monopoly right held by travel agents for the sale of tickets for "interline trips--those involving two or more airlines--is eliminated on December 31, 1984, as a transition to a more competitive marketing system.

--Antitrust immunity will be given to those carrier agreements governing the existing travel agent system until December 31, 1984, including that for the Area Settlement Plan, an agreement by which airlines and travel agents settle their accounts for tickets sold. After that time, antitrust immunity will not be needed, since the agreements, without the exclusivity provision, will not reduce competition.

--Provisions that prevent business travel departments from becoming accredited agents will continue to receive Board approval until December 31, 1984.

The primary difference between the Board's decision and the Administrative Law Judge's recommendation involves exclusivity and antitrust immunity. The ALJ would retain both, protecting the travel agent monopoly; the Board's decision eliminated both, certainly opening the sale of air transportation to the disciplining effect of potential competition, and perhaps to actual competition, if the conference agents do not meet consumer and airline needs.

Our reasons for this decision are several. The premise of our decision is based on the policy directives given us by Congress. It is that absent a showing that competition cannot work, the air transportation marketing industry should be opened to the normal operation of market forces. Unsubstantiated fears that competition will produce less desirable results is not a good reason to protect the present monopoly system from competition. Our review of the record in the case led us to conclude that the conference rules restricting entry needlessly denied competition and innovation both by the carriers in devising their marketing strategies and among the agents. Prohibiting airlines from dealing with anyone other than accredited agents is not necessary to produce the benefits of a conference system. The airlines have enormous incentives, without these restrictions, to continue to use the nationwide network of trained travel agents they have created. Also, we found that the possibility of entry of competing sales outlets will spur continued efforts to improve the distribution system, which is fundamental to efficient economic performance. This will benefit consumers by giving them a wider array of price and service options.

The judge never explained why competition would not work. He never explained why airlines could be relied upon to make their own decisions about where to fly and what prices to charge, but not about how to sell their services.

Also important, we could find no basis in the record to conclude that allowing more competition in the air transportation marketing system will destroy travel agents. Without access to all, or nearly all, of the carriers, no new sales mechanism can begin to rival the breadth of coverage of the accredited agents, and carriers on their own are not likely to establish sales outlets to match the 20,000 travel agent offices dispersed throughout the country. We are convinced that our decision will have little, if any, adverse effect on the travel agent industry. Air carriers and consumers have and will continue to rely on travel agents for a large volume of ticket sales, as long as their service reflects the demands of the marketplace and their price is reasonable.

Our decision simply lets competition occur. It does not require change. The decision reflects our belief that application of competitive principles will benefit all. Airlines will be able to make individual marketing choices to meet consumer demand. Travel agents will have greater freedom to operate their businesses to meet travellers' needs without airline interference. Consumers will benefit because competition will insure that they pay only for what they want in terms of service and cost. The bill, which would implement the ALJ opinion, would prevent this from happening.

The disapproved provisions of the carrier agreements that have caused the most concern have been those that require carriers to use only those agents that have been approved by the airlines' conference. They effectively eliminate the use of other persons who may be able to serve portions of the air transportation market more efficiently. We do not believe that the government should sanction that sort of restriction on free enterprise and innovation.

Our reasons for ending the exclusivity provisions that previously protected travel agents are based on the generally accepted interpretation of the antitrust laws, and the principles set forth in the Federal Aviation Act. These laws do not permit agreements among competitors that place unreasonable restraints on competition. The agreement must be tailored to place no greater restraint on competition than is necessary. The Board's decision reflects that principle. It ensures that only the pro-competitive portions of the agreements will remain.

The elimination of the provision that insures this monopoly will not throw the air transportation marketing system into chaos, as some supporters of this bill would lead you to believe. Air carriers have every incentive not to allow their tickets to be sold by unqualified persons. The airlines are financially responsible for their tickets that are sold, and also need the continued good will of their passengers. Nor will consumers abandon air transportation in droves, as some claim, if they have a bad experience with a particular sales outlet. They do not do so today. Consumers will take their business elsewhere to buy a ticket, as they do now.

The ALJ's decision, as implemented by this bill, would also grant antitrust immunity to all of the existing agreements. The power to confer antitrust immunity is given to regulatory agencies to preserve activities that would be considered an abuse of competitive processes in an unregulated industry. Antitrust immunity will not be granted unless there is a showing that it is required in the public interest and that the transaction will not go forward without that immunity.

Carriers will not, however, abandon the system simply because it no longer has immunity. The agreements, without the provisions disapproved by the Board, are pro-competitive, and will withstand challenge under the antitrust laws. The fear of those wanting immunity is based only on the novelty of operating as other industries do after being protected for over 40 years. But, this fundamental change is what deregulation is all about. As we have learned, carriers adjusted and ultimately ended up endorsing the freedoms offered in a competitive market. We consider it highly unlikely that carriers will abandon the substantial benefits of their carefully constructed agency system to avoid the speculative possibility of frivolous law suits. Again, experience teaches that carriers act in response to their economic self-interest, which clearly favors continuation of a travel agent system.

Eliminating antitrust immunity will subject the air transportation marketing industry to the full force of competitive market pressures. Exposure to antitrust liability has long been recognized as a means of ensuring competitive behavior in other sectors of our economy and of this industry. Congress should not single out this one part of the aviation industry for special treatment, because there is simply no justification for it.

There are some additional problems with writing the Administrative Law Judge's decision into law that I would like to point out.

The judge created a special exception for Ticketron to enter the industry. The bill could be interpreted as putting this exception into law, perhaps without possibility of change except by Congress. Congress would thus be in the awkward position of having endorsed an exception from a general prohibition for only one company and requiring any future potential competitors to come to Congress for similar treatment.

The judge attempted to make a distinction between marketing and agency exclusivity, which the carrier organization that administers the travel agent program called a "fiction without legal precedent." If adopted into law, that distinction would result in immense confusion in implementation, since there is no agreement in the industry or elsewhere as to what it means or what conduct it would permit or prohibit.

Implementation of the ALJ's decision would lead to the creation of a large regulatory network of regulations and opinions just to administer it.

All of the public parties in this case, the Department of Transportation, the Department of Justice, and the Board's Bureau of Domestic Aviation, opposed adoption of the judge's opinion. The public parties have been consistent under both Republican and Democratic administrations.

We are particularly concerned about incorporating by reference into law a judge's opinion that cannot be set out easily in the statute. Whereas policy guidelines enacted by Congress are flexible to adopt to the times, incorporating a judge's opinion by reference, not easily available to those who must comply, would stultify the system and be difficult to implement.

Further, if the Board's decision was arbitrary and capricious, the parties have the right to challenge it in the courts. The decision should be tested first under law before Congress takes action to intervene in an adjudicated case on behalf of one group over another.

Member Gloria Schaffer has dissented from the Board's opinion in the Marketing case, and does not concur in the views expressed in this letter.

If you would like more detail about the Board's action, the Board Members or their staff would be glad to talk with you at any time.

Sincerely,

Dan McKinnon

Dan McKinnon

Mr. MINETA. Please proceed.

TESTIMONY OF DAN McKINNON, CHAIRMAN, CIVIL AERONAUTICS BOARD; ACCOMPANIED BY GEORGE BARANKO, ATTORNEY; I. V. MELLUPS, ACTING GENERAL COUNSEL; AND SUSAN JOLLIE, ASSOCIATE GENERAL COUNSEL, ANTITRUST AND LITIGATION DIVISION

Mr. McKINNON. Thank you, Mr. Chairman. We thought we might have been on earlier today and the entire Board was here. Unfortunately, they had commitments this afternoon they had to keep, so I don't think any have gotten back yet. I did want to acknowledge they are highly interested in the proceedings and are sorry they can't be here.

At the table I have the General Counsel of the Board, I. V. Mellups; we have the head of the Antitrust Division, Susan Jollie, and the man who wrote the decision for the Civil Aeronautics Board, George Baranko, with us. So if we get very technical in detail, I would like to be able to call upon their expert advice and suggestions.

We have sort of broken our testimony down into two parts, one a rather detailed written part, and, for the record, the two orders that the Board adopted in deciding the marketing case.

They provide a full description of the marketing system, the issues, and the Board's reasoning.

The focus of my testimony today will be on some of the arguments I have heard against our decision and in support of H.R. 2053, the Air Travelers Security Act.

My oral testimony summarizes the more detailed statement submitted for the record. This is very special testimony, and I want to be sure you have all the facts on this important case.

Before I share with you what we did, it may be useful to let you know how the industry operated under regulation.

Basically, only airlines and travel agents could sell airline tickets.

Detailed rules on who could sell tickets were agreed upon by the airlines, acting through their trade associations.

No airline could pick its own agents, or let its appointed agents deviate from the common rules, without losing the right to sell its product through the agency system.

The Board sheltered the rules from the antitrust laws.

The main elements of the Board's decision can be quickly stated:

Joint accreditation of agents and the Area Settlement Plan—keystones of the agency agreements—were approved in principle.

Travel agents' exclusive license to sell air transportation was not approved.

Rules that stop business travel departments from becoming agents were approved for a 2-year period.

The antitrust laws would govern airline sales, just like other industries.

And we provided a 2-year period for transition.

We also said that we might reexamine the issue of antitrust immunity before sunset.

We took a long, hard look at the facts, the law, and the aviation policy that the Congress entrusted to our care before we took action.

The old system seemed sound. In many ways it was efficient and basically it worked.

But if you scratched beneath the surface, all was not well.

It is simply not true, as some have said, that the system "ain't broke, so why fix it?"

The record in the *Marketing* case provides four examples of new ideas that the airlines could have chosen to sell tickets. But exclusivity rules prohibited such sales. Those foreclosed innovations might have increased air travel and saved money for both the airlines and for you and me.

The ideas were:

Ticketron wanted to sell simple point-to-point tickets at its 650-plus existing outlets;

American Express wanted to control its own personnel standards at its 125 locations;

An organization called Hotels-Autos-Tours-Air wanted to make reservations for foreign visitors; and

Another organization called Airline-Tickets-By-Banks wanted to place automatic ticketing machines in banks.

There are, of course, other ideas that airlines could pursue. For example,

Direct sales through home computers;

Ticketing machines placed by agents in remote locations;

Sales outlets that are open only on weekends or in the evenings; and

Sales outlets that only do business over the telephone.

The airlines could probably think of more.

So could other entrepreneurs if they had the chance to compete.

The Board's decision allows the airlines, if they wish, to follow through on those ideas or others—if they want.

Despite what some might tell you, H.R. 2053, will block such innovation.

Marketing ideas would continue to be reduced to the lowest common denominator.

This hurts the airline industry and the consumer.

Consumers are also harmed, because everyone pays for marketing costs in the price of the ticket.

Competition forces airlines to control their costs. For example, they have done much to control fuel and labor costs.

Commissions represent the fourth largest expense category to the airlines, right behind labor, fuel, and maintenance costs.

And commission costs are continuing to rise.

They increased from $847 million in 1977 to $2.265 billion. That is the amount of commissions airlines paid on the more than $22 billion of air transportation agents sold in the year ending June 30, 1982.

In fact, travel agents recorded air transportation sales of $2.7 billion in airline tickets in June 1983 alone.

That figure is greater than their sales for the entire year of 1970. It also is 16 percent greater than June of last year. So—after 6 months—our decision has done nothing to harm travel agents. Airline revenues have not increased at anywhere near the same pace. The number of agencies have grown at a phenomenal rate.

Since 1971, they have increased at an annual rate of 11 percent per year. In 1971, there were 8,209 travel agents. Today, there are approximately 21,000. The travel agents will tell you this is because of the great job they are doing. They are right, which gives me a hard time understanding why they are afraid of competition.

It appears that exclusivity, coupled with the large percentage of airline seats sold by agents, explains why airlines often raise commissions, and hardly ever lower them.

The Board looked at the restrictions on competition and asked why they were necessary. What public interest did they serve? The facts showed that exclusivity serves no legitimate purpose. It does not increase productivity, or lower costs. This is fact, not theory.

The reason why airlines participate in the travel agent program is not exclusivity, but the area settlement plan and the basic common accreditation system.

We have done nothing to take that away. It seemed only fair to me, as we turned each airline loose to survive or fail based on its management talents, that they certainly needed and deserved to have control over all of their operations, including the sale and marketing of their own tickets.

The Deregulation Act told the Board to rely on competition, not regulation, to the greatest extent reasonably possible.

In the recent past, application of competitive principles has helped agents.

We have taken actions that eliminated carrier agreements fixing commissions and prohibited commissions on government travel. We also permitted in-plant agencies to share employees with their corporate customers.

Corporate travel now is 54 percent of agent bookings, compared to about 43 percent just a few years ago. This is not necessarily new traffic—but it is new ticketing for the travel agents, because it was previously done by the airlines, themselves. This represents a shift in business from airlines to agents.

Agents liked competition when it gave them access to business previously unavailable to them.

Will the Board's decision destroy the agency system?

In short, no.

If the present system is efficient, economic, and satisfies consumer demands, there will be no major changes. If the agent is good at what he or she does, the agent will prosper under the free enterprise system.

The system before our decision was basically a protectionist system. It was not necessary to have a healthy marketplace in the sale of airline tickets. We think the travel agency system will survive under the Board's decision.

H.R. 2053 is said to be a consumer protection bill. The effect of H.R. 2053 will not be to protect consumers, but to protect travel agents at the expense of consumers.

We carefully analyzed the claim that competence and honesty will suffer. We found that airlines have absolutely no reason to turn their retail operations over to people who are incompetent or dishonest. And they are not going to have the local hamburger house or shoeshine stand sell their tickets. Such arguments are simply scare tactics.

The airlines have too much to lose.

They must back up their tickets with performance or money, and satisfy their customers.

They bear the risk of lost sales or lost ticket stock.

The agents seem to fear that they will lose business. The evidence in the record presented by travel agents, themselves, was that agents would be in jeopardy of losing only 2 percent of sales. ASTA has recently tried to discredit the testimony of its own witnesses. ASTA's latest claim about revenue losses—$70 million in commissions—comes to no more than 3.4 percent of 1981 agent commissions.

In 1982, agents earned $151 million more in commissions than they did in 1981. That figure is just for the so-called national and major carriers. Our conclusion, therefore, remains the same. The agency system will continue and prosper under our decision.

Another argument you will no doubt hear is that the integrated air transportation system—interlining—will be harmed. Opponents of deregulation have used this cry of "wolf" many times before, as we moved to reduce regulation in various ways.

But the wolf has not come. Airlines continue to interline. There is no evidence to support the theory that interlining will disappear. Airlines interline because they gain customers and make money that way.

Also, interlining is controlled by separate agreements that are voluntary, are not exclusive, and often do not enjoy antitrust immunity. Interline tickets written by people who are not agents—BTD's, for example—are freely accepted. I would like to submit a copy of the ATC interline agreement for the record.

[The following was received for the record:]

Order 82-12-85

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its offices in Washington, D.C.
on the 16th day of December, 1982

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INVESTIGATION INTO THE COMPETITIVE :
MARKETING OF AIR TRANSPORTATION-- : Docket 36595
AGREEMENTS PHASES :
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OPINION AND ORDER

ERRATA

The following corrections and modifications should be made in the ordering paragraphs of Order 82-12-85:

1. Paragraph 9(b) covers matters in addition to the 80% rule, which was the only provosion we intended to address. The paragraph should be revised to read:

> "9.b. Section C(5), insofar as it requires a place of business to do at least 80% of its business with members of the general public, and section G(7);"

2. The reference in paragraph 10.b. to section "FF(3)(6)" should read "FF(3)(b);"

3. The reference in paragraph 16.b to section "G(2)(6)" should read "G(2)(b);"

4. The reference in paragraph 18 to "IATA Resolution 850a" should read "IATA Resolution 833;" and

5. The reference in paragraph 19 to "IATA Resolution 801" should read "IATA Resolution 871;"

The following corrections and modifications should be made in the Board's opinion:

1. The phrase "and the IATA cargo agency programs" in the second sentence of the fourth complete paragraph on page 4 should be deleted;

2. The citation to Orders "80-6-1/2, March 31, 1980; and 80-10-66" in footnote 76 on page 25 should be changed to Orders "81-6-1/2, March 31, 1981; and 81-10-66";

3. The incomplete citation that appears in footnote 336 on page 106 should be completed to read "234 U.S. at 409-11"; and

4. The citation to "Order 79-2-106 at 15" in footnote 387 on page 122 should be chaned to read "Order 79-2-108 at 15."

The following correction should be made to the concurring statement of Vice Chairman Bailey and Member Dalley. The citation to the case of Sugar Institute v. U.S. is omitted. The citation, "297 U.S. 553, 601-02 (1936)" should be added immediately after the case name.

Dated: March 21, 1983

82-12-85

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

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INVESTIGATION INTO THE COMPETITIVE MARKETING OF AIR TRANSPORTATION-- AGREEMENTS PHASES

DOCKET 36595

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Decided: December 16, 1982.

As modified, agreements of the Air Traffic Conference of America establishing a system for the common accreditation of passenger agents, and agreements of the International Air Transport Association establishing systems for the common accreditation of passenger and cargo agents are found not adverse to the public interest and not to substantially reduce competition within the meaning of Section 412 of the Federal Aviation Act, as amended;

As modified, agreements of the Air Traffic Conference of America establishing a clearinghouse for the settlement of accounts between passenger agents and air carriers are found not adverse to the public interest and not to substantially reduce competition within the meaning of Section 412;

Provisions of the agreements which require air carriers to deal only with agents accredited by the conferences are found to violate the Federal Aviation Act. However, continued approval of those provisions until December 31, 1984 to the extent they preclude the use of nonconference agents to write interline sales is found necessary to attain important public benefits;

Additional disapprovals, found required by the Federal Aviation Act, are detailed in the opinion; and

Grant of antitrust immunity for agreements establishing systems for the common accreditation of passenger agents, for agreements establishing a system for the common accreditation of cargo agents, and for agreements establishing a clearinghouse for the settlement of accounts between passenger agents and air carriers until December 31, 1984 are found to be required by the public interest.

Appearances:

Same as in the administrative law judge's initial decision, except as follows:

Richard Stein for the National Passenger Traffic Association
Frank Cotter for U S Air, Inc.
Robert Duggan and Pamela Reynolds for Eastern Air Lines
John Simpson for Air Cal

OPINION

BY THE BOARD:

INTRODUCTION

In calendar year 1979, sales of scheduled passenger air transportation in the United States were $18.7 billion. Of that amount, more than half was sold by travel agents. [1] Almost 20,000 agent locations provide air carriers with sales outlets throughout the United States. [2] Air carriers do not deal with each agent individually but through their trade associations. Most major air carriers providing interstate and overseas air transportation are members of the Air Traffic Conference of America (ATC), which sets standards for travel agents selling overseas and domestic air transportation. Its international counterpart, for travel agency purposes, is the International Air Transport Association (IATA).

We do not have direct regulatory responsibility over travel agent activities. Our role derives from section 412 of the Federal Aviation Act, 49 U.S.C. 1382, which provides for the filing of agreements between air carriers, such as those establishing systems for the common accreditation of agents. Section 412 requires us to approve an agreement unless it is adverse to the public interest or in violation of the Act. It prohibits us, however, from approving any agreement which would substantially reduce competition unless the agreement meets serious transportation needs or provides important public benefits that cannot be achieved by reasonably available, less anticompetitive alternatives. In addition, we have the authority to shield agreements we have approved from the operation of the antitrust laws by conferring antitrust immunity pursuant to section 414 of the Act.

The ATC and IATA agreements establishing systems for the common accreditation of passenger agents were first filed with us in the 1940's. Since our initial approvals and grant of antitrust immunity, the agreements have continually been revised through the process of repeated amendments. The system of rules now in place is an extensive one, governing most facets of the travel agent-air carrier relationship.

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[1] ASTA-20 at 30. Agents sell approximately 54% of domestic air transportation and 70 to 80% of foreign air transportation. ASTA-20 at 30, IATA-T-4 at 5-6, I.D. at 40. Of course, the figures for individual air carriers vary significantly. See the figures for various carriers set out in Appendix B. A recent study of the travel agency industry indicates that the amount of domestic air transportation travel agents sell continued to increase significantly each year through 1981. Travel Weekly's Louis Harris Study at 17, 23, May 1982.

[2] See, page 16 n.28, infra.

This proceeding was begun in September 1979, by Order 79-9-64, at a time when we were reviewing each of the areas of our regulatory responsibility in light of the procompetitive mandate of the airline deregulation movement. [3] We proposed to re-examine our approval and grant of antitrust immunity to air carrier agreements governing entry into the air transportation marketing industry, particularly those creating a system for the common accreditation of agents. In addition, the proceeding also considered IATA agreements relating to the sale of cargo air transportation through agents and ATC agreements establishing the Standard Ticket and Area Settlement Plan (ASP) by which accounts are settled between passenger agents and air carriers. [4]

A hearing was held before Administrative Law Judge Ronnie A. Yoder. Thousands of pages of documents were submitted for the record and ninety days of testimony were heard. Judge Yoder's initial decision was served on June 1, 1982. For the most part, Judge Yoder found that the Board should continue to approve the ATC and IATA agreements at issue. He concluded that the travel agency system that has grown up under these agreements does not lessen competition in the sale of air transportation services and that the current travel agency system provides many important public benefits and serves important transportation needs. Judge Yoder also found that the Board should continue to grant the agreements antitrust immunity. [5] In our instituting order we determined that we would review the decision of the administrative law judge in its entirety. [6]

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[3] While air carrier entry and pricing were our first priorities, we reviewed all our functions, including for example, our airline merger policies, our regulation of air freight forwarding and charter transportation.

[4] While the agreements establishing the agency systems and the ASP are the major agreements at issue, there are others, including agreements dealing with IATA general sales agents, cargo settlement systems and IATA settlement standards.

[5] Judge Yoder's specific conclusions will be considered throughout this opinion. Except to the extent modified or disapproved we adopt his conclusions as our own. His Initial Decision is attached as Appendix A.

[6] Order 79-9-64 at 4. See also Order 82-6-54, June 9, 1982.

Briefs and reply briefs have been filed [7] and oral argument was heard on September 15 and 16, 1982. [8]

SUMMARY OF OUR DECISION

A. Overview

Our task in this proceeding involves the review of the air transportation sales network, which is the product of almost 40 years of carrier agreements and Board orders. Our decision will set the course for air transportation marketing for the indefinite future. During the period of close regulation of airline activities, we could permit air carriers to agree on their marketing systems. Marketing systems founded upon joint carrier decisionmaking complemented the tightly regulated air transportation industry. In both instances, competition occurred only within narrowly defined parameters. Implicit in this tightly regulated scheme was the judgment that competition could not be relied upon to produce the optimal air transportation services.

With the Airline Deregulation Act (ADA), Congress rewrote the operating assumptions in the airline industry. Government oversight of fares and services was replaced with reliance upon market forces to determine which carriers provided service and at what prices. Of course, the new reliance on competition has not been limited to entry and fares, but is to be the basis for all our decisions. [9] That must be our starting point in this case. Absent a demonstration that the public would be better served by solutions that cannot be attained in a competitive environment, the air transportation marketing industry must be opened to the normal operation of market forces.

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[7] Briefs to the Board were filed by the following parties: ATC, IATA, American Airlines, Inc., the American Automobile Association (AAA), American Express Company, the Association of Retail Travel Agents (ARTA), the American Society of Travel Agents (ASTA), Associated Travel Nationwide (ATN), the Bureau of Domestic Aviation (BDA), A.V. Costantini, the Department of Justice (DOJ), the Department of Transportation (DOT), Hawaiian Airlines, Inc. jointly with Aloha Airlines, the International Airforwarder and Agents Association (IAAA), Northwest Airlines, Inc., Ticketron Division of Control Data Corp., and the National Passenger Traffic Association (NPTA). The Hawaiian/Aloha and Northwest filings were accompanied by motions for leave to file an otherwise unauthorized documents, which we will grant.

[8] Motions to correct the transcript of oral argument were filed by ATC, ASTA, ATN, BDA, IATA and IAAA. These motions will be granted. ATC has also filed a motion to mark for identification and receive in evidence a post oral argument exhibit. No one has objected to the motion, and we will grant it.

[9] Sections 102(a)(4) and 102(a)(9) of the Federal Aviation Act of 1958 (the Act) as amended by the ADA, 49 U.S.C. 1302(a)(4) and 1302(a)(9) specifically establish reliance on market forces, and fostering a competitive environment as elements in the public interest in all Board actions, including actions under section 412. In addition, both section 408 49 U.S.C. 1378 (mergers) and section 412 contain a specific prohibition on Board approval of anticompetitive acts except under unusual circumstances.

As a result, we approach arguments that competition is necessarily destructive and that government intervention is preferable to the free marketplace with a large measure of skepticism. Unsubstantiated fears that competition will produce less desirable results than those produced under regulation are simply not a sufficient reason to protect the present system from competition.

At one time we suggested that the only means of inducing competition into the air transportation marketing system was to disapprove the complex agreements governing the air transportation industry. We do not now believe that disapproval of the agency agreements in their entirety is either required by the antitrust laws or wise as a matter of policy. Past regulation has undoubtedly fostered a system that is more comprehensive and intrusive into individual business decisions than a distribution system that would have arisen under purely competitive conditions. But regulation also attempted to insure that participation standards were objective, embodied procedural safeguards, and served air carrier interests in expanding the number of sales outlets. Because the existing sales network offers competitive advantages, there are sufficient reasons not to discard the legacy of regulation.

Our review of the record in this proceeding has led us to conclude that the forces of competition can be brought to bear on the marketing industry by eliminating those provisions that prevent air carriers from using and compensating persons other than agents accredited by their trade association for selling air transportation. With the elimination of these so-called exclusivity provisions, persons who may be able to meet portions of airlines' or consumers' demands more efficiently than travel agents will be free to contract with air carriers to sell their services. This new group of potential entrants is not likely, in our view, to displace the existing travel agency network. Travel agents are, at the present time, a very efficient means of distributing air transportation services. Rather, the possibility of entry by competing distribution modes will provide the spur to continued efforts to attain greater efficiencies fundamental to competitive economic performance.

We will not, however, immediately disapprove the exclusivity provisions in their entirety. We have decided to phase out the exclusivity provisions of the ATC and IATA passenger agency programs, and the IATA cargo agency programs in two stages. Upon the effective date of this order, the exclusivity provisions will be disapproved to the extent they preclude a conference air carrier from paying a commission or other sales remuneraton to any person, other than a conference agent, selling its own air transportation. There is no reason to preclude an air carrier from deciding to use and compensate a nonaccredited agent when only that air carrier's services are involved.

However, air carriers have also entered into agreements with one another which permit one air carrier, or anyone selling air transportation on its behalf, to write tickets which include another carrier's services. Where such interline tickets are involved, one air carrier has a limited interest in the quality of another carrier's distributor. The interest does not stictly relate to the financial responsibility for the ticket because the carrier whose ticket is used is responsible for payment to all transporting carriers on the flight itinerary. Instead, the interest is in insuring that the ticket is properly written and consumers are not inconvenienced, which would redound in ill-will against the transporting carrier.

Because existing interline agreements were entered into with the exclusivity provisions in place, it is unlikely that carriers considered the use of non-accredited distributors by their interline partners. To afford carriers the opportunity to reconsider the terms of their interline agreements, in view of our decision here, we will continue to approve the exclusivity provisions to the extent that they preclude the use of and payment of commissions or other sales remuneration to non-accredited agents by conference members for the sale of interline transportation until December 31, 1984. Our continued approval of the provision will prevent an air carrier from using non-accredited distributors to write tickets involving interline transportation in the absence of an agreement between or among interlining carriers that provides otherwise.

We believe this approach in conjunction with our decision to withdraw antitrust immunity from the programs in two years insures a smooth transition to a more competitive environment. It provides a period of time for air carriers to reconsider how their service is distributed and is responsive to concerns about a decision that would require drastic changes in the marketing of air transportation. Our transitional approach very carefully balances the divergent interests of air carriers, travel agents, and potential entrants into the marketing industry.

Moreover, we can find no basis to conclude that allowing more competition in the air transportation distribution system will threaten travel agents accredited under the current agreements. Application of competitive principles that apply to unregulated industries is not incompatible with the basic structure of a distribution system in which air carriers use common agents. We are convinced that our disapprovals in this case will have little, if any, adverse effect on the air transportation system or the travel agent industry. Air carriers have been and will continue to rely on travel agents to sell a substantial volume of air transportation.

Our required revisions will merely permit competition to occur. We will require no changes. As a legal matter, we are disapproving an agreement among competitors that unnecessarily restricts competition. Individual carriers will not be required to act any differently than they do today, as long as this choice reflects an individual carrier's independent judgment and is not the consensus of competitors. Nor will our decision require any changes in the way individual travel agencies operate.

Although we have approved virtually all of the provisions relating to the accreditation programs, this does not necessarily mean that these standards are perfect. Some standards may be more rigorous than those that would evolve in a competitive market. We have not, however, attempted to refine the standards of the program so that they duplicate those that would have arisen had we not regulated the industry. It is unlikely that we could do so. We prefer that the standards be changed in response to the normal operation of market forces. For that reason, we intend to withdraw antitrust immunity from the passenger agency programs after a period of transitional immunity.

This decision reflects our belief that adherence to competitive principles is beneficial to all concerned. Airlines will be able to make individual marketing decisions responsive to consumer demands. Travel agents will have enhanced freedom to operate their businesses without undue carrier interference. Consumers will benefit because competition insures that they receive the most efficient, lowest cost air transportation. If the present system already exhibits these traits, as their proponents contend, then there will be no significant changes from the distribution system now in place. If the system can be improved, then the unfettered operation of the market will result in greater consumer benefits. Finally, eventual withdrawal of antitrust immunity will remove the need for government oversight.

The issue is not, then, whether the existing system works well but rather whether it can be improved under more competitive conditions. In the end, we think that the distribution system that evolves should be determined by the marketplace, consistent with our goals under deregulation. We have adopted an approach designed to ease the transition to a more competitive environment. Our decision reaches a proper accommodation between the procompetitive demands of the Airline Deregulation Act, and the concerns that have been expressed about preserving the benefits of the existing system.

B. Legal Standards

In the context of section 412, we have been guided by the principles developed under section 1 of the Sherman Act in determining whether an agreement would substantially reduce competition. At one time, we thought that these principles might require disapproval of the agreements. The present travel agency agreements severely constrain the distribution decisions of all air carriers. Decisions about the distribution of services can be viewed as central to the competitive functioning of the marketplace. Therefore, an agreement among competitors that involves such relationships could be viewed as inimical to the antitrust laws.

Our review of the antitrust laws, however, has made it clear that some forms of cooperative behavior are permitted. At times, cooperative agreements actually enhance competition by making the manufacture or sale of goods or services more efficient. In such circumstances, costs to the producers are lowered, and these savings could be passed on to consumers.

Disapproval of the agreements in their entirety would not, in our judgment, give proper recognition to the efficiencies that are achieved through the integration of certain functions under the auspices of the carrier trade associations. We are convinced that with modifications the basic air transportation distribution system can be conformed to the demands of the antitrust laws without jeopardizing its essentially procompetitive features.

The ATC and IATA agreements which set standards for common passenger agents reduce the cost of securing sales outlets to individual carriers. Air carriers can appoint many more agents than they could if each carrier set its own appointment standards and bore the cost of screening, monitoring and disciplining its individual agency network. The cost of entry and exit into new markets is reduced because air carriers do not have to bear the cost of establishing a new distribution network. Travel agents, in turn, are in a position to sell the services of more air carriers and the public is given a greater choice of service options.

The antitrust laws do not, however, permit cooperative agreements that place unreasonable restraints on competition. An agreement's provisions must be related to its efficiency objectives and be tailored to place no greater restraint on competition than is necessary to accomplish those objectives. For example, an otherwise acceptable joint venture that includes restraints to allocate markets that are not necessary to achieve efficiencies has been found to be anticompetitive. 10/

C. Exclusivity

The provisions of the ATC and IATA agreements that require air carriers to use and pay remuneration to only conference approved travel agents--the exclusivity provisions--have had a substantial effect on air transportation distribution systems. They effectively eliminate the possible use of other persons as agents in the sale of air transportation. Air carriers cannot, then, obtain the benefits of the conference systems and experiment with other marketing outlets, some of which may be able to serve portions of the air transportation market more efficiently.

It has been argued that the effect of the exclusivity provisions can be limited so they only govern dealings with agents, leaving carriers free to deal with other non-agent marketers. Non-agent marketers, then, would provide the disciplining effect fundamental to competitive market performance. We conclude that the exclusivity provisions cannot be interpreted in this manner. The IATA exclusivity provisions, which have always been limited to agents, have in fact precluded marketing innovations just as effectively as the ATC provisions which refer to both agents and marketers. Moreover, our review of the record demonstrates that agency is a very broad term, foreclosing most types of entry that might occur in the

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10/ See *U.S. v. Topco Associates, Inc.*, 405 U.S. 596 (1972). *See also* Sullivan, Antitrust §80 (1977).

marketing industry. As a result, as long as the exclusivity provisions are in place, the opportunity for disciplining entry is extremely remote.

It has also been argued that the exclusivity provisions are necessary to achieve the efficiencies of common accreditation. Some parties maintain that absent the exclusivity provisions, carriers and agents will abandon the common accreditation system. In essence, they argue that exclusivity is necessary to induce carriers and agents to participate in the joint venture. However, common accreditation affords carriers (and agents) a significant potential for scale efficiencies they could not otherwise obtain. A system of common accreditation that is reasonable under the antitrust laws provides its own inducement to participants. If carriers really regard the venture as yielding efficiencies, they will participate in the common accreditation program regardless of the existence of the exclusivity provision. They will use other marketers only where they are more efficient, innovative, or serve different market demands.

Exclusivity has also been defended on the grounds that, regardless of competitive effect, it secures important public benefits, such as interline transportation, avoiding conflict with foreign governments, and insuring public benefits such as confidence in the air transportation system. Our review of the record demonstrates that none of these benefits justify indefinite retention of the exclusivity provisions.

With respect to interlining, proponents argue that current interline agreements between air carriers are dependent upon air carriers' mutual confidence in one another's agents. It is said that air carriers are only willing to accept air transportation written by another carrier's agents because the conference agreements insure that the other carrier's agents are competent.

By appointing a person outside the agency programs, a carrier cannot force other carriers to bear the financial responsibility on tickets written by its agents. The financial responsibility for a ticket is borne by the carrier whose ticket is used, no matter which or how many carriers are on the flight itinerary. 11/ The public benefits argument has a different focus: that carriers will be less willing to interline with a carrier who uses non-ATC/IATA agents because that carrier's agents will not be competent and will therefore generate ill-will by overbooking flights, misticketing passengers and generally providing poor service to the public.

The extent to which a carrier's agents can write transportation involving another carrier is controlled by interline agreements, not the passenger agency agreements. An air carrier has always had the ability to refuse to honor a ticket written by another carrier's agents through modifications in the interline agreements. We recognize, however, that existing interline agreements were entered into with the knowledge that the

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11/ An individual carrier becomes responsible for a ticket written on standard stock by the use of its validation plates.

exclusivity provisions were in place. Carriers have not, then, had an opportunity to decide whether their interline agreements should be modified to permit or deny other carriers' non-ATC/IATA agents from writing interline air transportation. For that reason, we will allow for a period of adjustment. We will continue to approve the exclusivity provisions, until December 31, 1984, to the extent that they preclude ATC and IATA carriers from authorizing nonaccredited sales outlets to write interline transportation. We shall require that carriers be free to agree between or among themselves to honor tickets written by each other's non-accredited sales for interline transportation affecting the agreeing carriers' routes. This period will afford carriers the opportunity to re-examine their interline agreements in light of our decision in this case. We encourage carriers to begin this process immediately and we are, of course, prepared to consider any changes that they submit for our approval.

It should be noted that, in the past, carriers have generally permitted other carriers to place ticket stock in corporate travel departments that write interline tickets even though they are not accredited. Similarly, one carrier relies on the qualifications of the other carrier's own employees, who also freely write interline tickets. Carriers have every incentive to maintain their own business reputations and the intercarrier agreements that are beneficial to them. Therefore, we do not anticipate any erosion of interline ticketing. In any event, interline tickets will continue to be available through conference accredited agents and, on the basis of the record, we foresee no contraction in the number or distribution of these agencies. Carriers will have a sufficient opportunity within this transition period, to modify their interline agreements give themselves added control over any non-accredited sales outlets with which their interline partners might decide to do business. Accordingly, indefinite approval of exclusivity for interline agreements cannot be justified.

Several parties have argued that any significant disapproval of the IATA agency program will be interpreted by foreign governments as a denial of fair and equal access to the U.S. air transportation market. It is suggested that this will prompt retaliatory action and that to avoid this situation, the agreements should be approved in their entirety for international comity and foreign relations grounds.

All the evidence in the record indicates that foreign governments' concern was that we would disapprove the entire IATA program and deny them common agents for the sale of their air transportation within the U.S. Eliminating exclusivity, of course, does not have that effect. The conference programs will continue to receive our approval. Moreover, foreign carriers and U.S. carriers will continue to have exactly the same marketing opportunities within the U.S. Any carrier can continue to rely on the conference programs, appoint other types of marketers or use both. Eliminating exclusivity merely gives them increased freedom in marketing their services within the United States.

Another public benefit argument for retention of exclusivity concerns public confidence in the competence of travel agents. This argument is also premised upon the notion that elimination of exclusivity will permit unqualified persons to pass themselves off as travel agents.

The assumption implicit in this argument is that any sales outlet that does not meet the present common accreditation standards will necessarily be unqualified to sell air transportation. Even if carriers choose to use unaccredited agents, it is not reasonable to expect them to deal with incompetent or dishonest marketers. Carriers will bear the immediate financial losses caused by unqualified agents as well as the long term effects of consumer ill-will. Most of the evidence parties offer to support this argument is based on events that occurred over 40 years ago when the infant airline industry lacked established distribution outlets. The dramatic change in the industry since that time was one of the primary bases for deregulating the industry. It would be incongruous to blindly accept those arguments now to foreclose competition in the distribution of the deregulated airline service. With almost 20,000 accredited agencies now available to conference members, it is unrealistic to assume that they would be compelled to use unqualified outlets to gain market access if exclusivity were eliminated.

Indeed, there is nothing in our decision that will compel carriers to deal with any agent or marketer. If carriers individually determine that dealing exclusively with accredited travel agents is the best way to market their services, because it is the most cost effective or preserves public confidence, or for some other reason, then some will not pursue alternative marketing approaches. However, the opportunity to compete is essential to the competitive functioning of the marketplace. We are not forcing changes in the marketing system. Rather, we are merely ensuring that the conditions for competition are present.

From the consumer's perspective, the argument for retention of exclusivity hinges upon the assumption that consumers will forego air travel if they have unpleasant experiences with unqualified persons. That, of course, is not what occurs today in the air transportation marketing industry or any other industry. Consumers will react to poor service by taking their business to another marketer.

Given the reputation of ATC and IATA agents, they will have an advantage over any new marketer that may enter the industry. Existing agents can differentiate themselves by highlighting their ATC and/or IATA approval. They alone will be free to identify themselves as accredited travel agents meeting industry standards. In this regard, ATC and IATA could promote the use of identifying trade names such as "travel agent" or "travel counselor" alone with an identifying symbol or trademark. In addition they could promote the fact that accredited agents assure industry representation, as opposed to offering services of one or a few carriers. Similar distinctions are made in other industries--for example, independent insurance agents. There is no reason to believe that consumers will be unable to differentiate ATC/IATA agents from other marketers. Moreover, which outlets will prosper will be determined by how well each provides its services for the public.

Finally, the eventual elimination of exclusivity will perfect the efficiencies of the existing ATC and IATA programs. We have consistently recognized that the potential for entry is an important facet of competitive performance. It affords carriers an opportunity to continuously evaluate developments in the marketplace and respond quickly to changes. It also affords new forms of marketers the opportunity to enter to meet demands they see for marketing services. Moreover, if the ATC or IATA programs are not the most cost efficient or are not serving some segments of the market effectively, those firms now dealing within the confines of the agency programs will have increased opportunities to pursue other modes of doing business.

We fully expect that travel agents will be in the forefront of any marketing innovations. If the agency agreements unduly hamper their competitiveness, they can more effectively argue for changes within the program or pursue their economic self-interest by dealing with carriers either individually or through other associations that better serve their interests.

With our phased disapproval of the exclusivity provisions, and a small number of other modifications of the programs in addition to those recommended by the administrative law judge, we conclude that the ATC and IATA passenger agency programs should be approved.

D. Antitrust Immunity

The power to confer antitrust immunity is given to regulatory agencies in order that they may protect conduct which would be considered an abuse of competitive processes in an unregulated industry from antitrust challenge. We have recognized, therefore, that full antitrust exposure is consistent with deregulation and have set a high standard for granting antitrust immunity. Antitrust immunity will not be granted unless an applicant shows that immunity is required in the public interest and the transaction will not go forward without that immunity.

Applying that policy to this case, the need for indefinite antitrust immunity has not been fully established. The public interest arguments that have been raised are founded on the view that carriers will abandon the ATC and IATA systems because of the cost of law suits. Their argument makes sense only if any accreditation program would be found to be anticompetitive. It is clear, however, that with the exception of a handful of anticompetitive provisions, the agreements are on balance procompetitive. We have no doubt that with modifications the agreements could be conformed to the standards of the antitrust laws. We therefore consider it highly unlikely that carriers will abandon the substantial benefits of common accreditation to avoid the costs of defending it against frivolous law suits.

More important, eliminating antitrust immunity will subject the air transportation marketing industry to the full force of competitive market pressures. Exposure to antitrust liability has long been recognized as a means of ensuring competitive behavior in other sectors of our economy. The reduction of our discretion under Sections 412 and 414 of the Act and the policy emphasis on competition in Section 102, by the ADA, shows that the Congress intends that air transportation be governed by the same incentives, wherever possible. Eventual elimination of antitrust immunity, therefore, appears to be most consistent with deregulation of the air transportation industry.

We recognize that the common accreditation systems have operated for almost 40 years with protection from antitrust challenge. Although this does not justify continuing antitrust immunity for the programs indefinitely, it does support a period of transitional immunity for the programs. We believe section 414 affords us some discretion to ease the transformation of the air transportation distribution industry to a competitive environment.

A gradual transition will also permit air carriers to re-evaluate the specific standards of common accreditation. Our decision identifies provisions of the agreements that might pose concern about future antitrust liability. Moreover, our conclusion that the standards relating to competence, for example, are designed to protect legitimate carrier interests, does not mean that they are perfect. Additional modifications may be required. Rather than dictate changes to the carriers, we believe it is more consistent with deregulation to allow the air carriers to re-examine the remaining rules themselves to possibly amend other provisions they believe are unduly restrictive. Moreover, they may wish to make changes in the programs they feel are desirable. To provide them time to undertake these tasks, we are conferring antitrust immunity on the passenger agency programs until December 31, 1984.

We will, consistent with past decisions where we have eliminated antitrust immunity, monitor changes in the conference programs over the next two years. Should important needs or future events come to our attention that indicate that further consideration of the immunity issue is warranted, we will, of course, give it. We invite interested persons to bring new matters to our attention before the end of 1984.

E. ASP and Cargo

Our review of the ATC agreements establishing the Area Settlement Plan and IATA agreements establishing a system for the common accreditation of cargo agents reveals that those programs present very few competitive problems. ATC contends that any person wishing to participate in the ASP who is willing to abide by its rules and meet security standards is provided access to the plan. Given this understanding there is no basis to conclude that access will be denied unreasonably. The ASP involves a cooperative agreement among airlines to integrate the process of settling accounts with accredited travel agents. Its benefits are even greater than those of the common accreditation programs. It substantially reduces settlement costs to carriers and agents, which benefits are passed on to the public. Consistent with our decision on the passenger agency systems, antitrust immunity for ASP will end December 31, 1984. We will, of course, consider the issue further if circumstances change as discussed above.

The IATA cargo agent program includes exclusivity provisions comparable to those we have disapproved in the IATA and ATC passenger agency programs. We will disapprove those restrictions. The cargo marketing industry is, on the whole, very competitive and can readily be adjusted to the new environment. Consistent with our decision on the passenger agency systems, antitrust immunity for cargo will end on December 31, 1984. We will of course, consider the issue further if circumstances as discussed above.

Having completed our summary of our decision, we now turn to the task of reviewing the conference agreements. We will first examine the ATC and IATA agreements establishing passenger agency systems. They are very similar and are best examined together. The ATC agreements establishing the Standard Ticket and Area Settlement Plan, and the IATA agreements establishing the cargo agency system will be examined separately.

HISTORY OF THE PROGRAMS

Prior to the development of the travel agent programs, the airlines individually controlled the outlets that could distribute their tickets to the general public. In the infant days of scheduled air transportation, many carriers gave their tickets to hotel porters, bell captains, taxi drivers and other persons with day-to-day contact with travelers to sell their service. [12] The use of such persons created a number of problems. Passengers were frequently misinformed on available services and fares and, at times, defrauded by unscrupulous sellers. [13]

The original ATC agreements did not, so much, establish a system of common agents as establish a single screening body that member air carriers would use in selecting their agents. [14] ATC screened agent applicants, sponsored by an airline, to ensure that they were qualified. No specific standards for accreditation were contained in the agreement. If an applicant was approved by a majority of the committee, the person was an agent for the sponsoring carrier. Other carriers were then free, individually, to decide to appoint the new agent. This system was exclusive. That is, air carriers could not use non-approved agents.

12/ ATC-T-1 at 4-5; ATC-IR-1 at 2-3; and Buchanan (ATC) 37 Tr. 17-18.
13/ See *ATC Agency Resolution Investigation*, 29 CAB 258, 288 (1959) and ATC Memorandum dated June 9, 1943 *in re* Agreements CAB 182-B and C.
14/ "[T]he resolution established that the machinery whereby persons who had been previously appointed by individual airline members of ATC could have such individual appointment reviewed by the ATC Agency Committee to determine their eligibility for inclusion on the 'Agency Control List', and therefore their eligibility for appointment for all airlines. Any person who wished to become a travel agent submitted his application through a sponsoring ATC member for consideration by the ATC Agency Committee. Other than the airline sponsorship, there were no standards for agency accreditation." ATC-T-1 at 6.

Although adopted and approved in 1940, the ATC program could not be implemented because of the Second World War. 15/ In 1945 the agreements were revised and resubmitted to the Board. These agreements provided the first real standards for accreditation. They provided that a prospective agent must be acceptable for bonding and not have a reputation for unethical business practices. A short time later, ATC adopted provisions requiring that a need for a new agency location be shown. These agreements were also approved. 16/

The IATA passenger agency system was based upon the ATC model. 17/ First approved by the Board in 1948, 18/ the IATA program was an effort by foreign air carriers to establish standards for persons selling international air transportation in the United States. Over the years, the programs have remained very similar. Changes in one conference program are frequently duplicated in the other with a short time lag. The similarity of the programs has resulted in a virtual identity in the agents used. Almost all persons who become accredited by ATC obtain IATA accreditation shortly thereafter, or vice-versa. 19/

Over the years, the ATC and IATA passenger agency agreements have gone through a large number of changes. One of the most important was the Board disapproval, in 1959, of the ATC provisions requiring that a need for a new agency application be shown and the provision requiring an applicant to have a carrier sponsor. 20/ The effect of those disapprovals was to give ATC a far larger role in the approval of agency locations. It assumed the independent responsibility to screen prospective applicants, with the power to accredit them. Carriers then decided whether to appoint the agents ATC indicated had met its standards. The 1959 decision also prompted adoption of objective qualification standards which are the basis for the financial and personnel standards in existence today. 21/

Not only have the standards changed over time, so has the travel agents' role in selling air transportation. Historically, travel agents were viewed as promoters of air transportation. Air carriers saw their role as generating traffic, i.e., inducing persons to travel who would not

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15/ ATC-T-1 at 6-8, Order No. 983, April 18, 1941.
16/ Order E-5685, September 9, 1951.
17/ IATA-IR-1 at 7.
18/ Order 1315, March 22, 1948.
19/ It has been stated that no more than 500 IATA agent locations are not accredited by ATC. Saunders (ATC) 4 Tr. 194. Only two percent of the agents responding to the Harris survey were only accredited by ATC. ATC-IR-905 at 152.
20/ ATC Agency Resolution Investigation, 29 CAB 258 (1959).
21/ ATC-T-1 at 9.

otherwise fly. [22] Airlines attempted to retain for themselves the nondiscretionary sales, that is persons who had to fly and simply needed ticketing and reservations services. While air carriers could not deny travel agents all such sales, a number of restrictions were incorporated into the ATC and IATA agreements to deny travel agents access to nondiscretionary travelers.

For example, ATC and IATA forbade the location of travel agencies at airports, or in hotel lobbies. Air carriers believed that persons who agents would serve there would already have made travel plans.

Over time, many of the restrictions based on this perception of the travel agent's role have been removed. For example, in 1965, ATC attempted to prohibit agents from establishing branch offices on the premises of commercial customers ("inplant" locations). We disapproved the agreement on the grounds that preserving commercial business for the airlines was not a sufficient reason for denying commercial customers the convenience and other benefits of in-plant facilities and agents the economic advantage of assuming this activity. We determined that carriers' legitimate concerns about rebating and the value of inplant services could be met by less restrictive measures, such as restricting the compensation of in-plant customers for facilities and providing for lower commission levels. [23] Our decision facilitated the increased use of travel agents to provide ticketing and reservations services to business travelers. More recently, air carriers voluntarily eliminated a provision that precluded the payment of commissions on tickets purchased under the Universal Air Travel Plan (UATP), which is essentially a credit card for frequent, usually business travelers. [24] As a result of these and other changes, travel agents have been serving the business traveler--the pre-eminent "nondiscretionary traveler"--in ever increasing numbers. In 1978 at least half of all their sales were to persons traveling on business or for business and pleasure. [25]

There have been a number of other major changes in the programs, such as the introduction of the Travel Agent Commissioner program in 1977. [26] It is through the process of repeated amendment that we have the program in place today.

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[22] Buchanan (ATC)36 Tr. 88-90. See also 29 CAB at 286-87.
[23] Order E-21726, January 27, 1965 at 4.
[24] Buchanan (ATC) 37 Tr. 183-84.
[25] ATC-17 at 3-4. Sales to commercial accounts accounted for 40% of agents' sales in 1978. That figure has risen continuously from 1970 when it was 28%. Id. at 5. See also, ASTA-IR-24 at 83. For a discussion of the characteristics of business travel, see Buchanan (ATC) 36 Tr. 140-42.
[26] That program provides for the review and disposition of disputes between ATC and travel agent applicants or agents before an impartial and independent Travel Agent Commissioner. Agents and applicants are free to request arbitration of Commissioner decisions. Approved by Order 76-5-57, May 14, 1976. IATA adopted a similar agreement in 1980. Approved by Order 80-7-112, July 7, 1980.

The existing ATC travel agent program is, for the most part, contained in Resolution 90.3. That resolution was the result of the consolidation and simplification of Resolutions 90.1. and 90.2 that previously governed the ATC program. We approved 90.3, pending a final decision in this case, by Order 80-9-161. It went into effect on August 12, 1981. Most of the IATA travel agency program appears in Resolution 802. It too is the product of amendment and simplification of the previously effective resolution. We granted it interim approval by Order 80-6-107.

THE ROLE OF TRAVEL AGENTS IN MARKETING AIR TRANSPORTATION

Travel agent outlets are the core of the air transportation distribution system. Except for direct carrier sales outlets, and a limited number of special ticketing services for persons who ticket their own transportation, carriers rely on travel agents to sell their services to the public. [27] At the present time there are approximately 20,000 travel agent locations throughout the United States. [28]

Under the Small Business Administration definition, most travel agents are small businesses. The SBA defines a small business to be one with under two million dollars in annual sales.[29] The evidence we have indicates that about 74% of travel agents have sales volumes of less than $2 million.[30] A large portion, 46%, of travel agencies are owned by women, and a significant number, 11%, by minorities.[31]

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[27] Most airline ticket offices are located at the airports a carrier serves (ATO's), or in downtown offices in large cities (CTO's). There are a few Scheduled Airline Ticket Offices (SATO's) located on government premises, such as military bases. Carriers also have attempted to make it easier for some persons, usually corporations, to do their own ticketing. In this category are the following: (a) Flite cheks--a form of self ticketing in which a book of 20 documents are issued to an account. Flite cheks are used in lieu of tickets by the customer who books a flight, fills in the flight number on the document, and presents it at the airport. The customer is billed monthly. JRC (EA)-IR-31 at 9; (b) Placement of ticket stock with commercial accounts--a number of carriers give their ticket stock to large corporate purchasers. A corporate employee calls for a reservation and then prepares the ticket, if the corporation does not have automated equipment. Tickets are completed by machines if a corporation has automated equipment. The customer is billed periodically. JRC(EA)-IR-31 at 5-9 and JRC (DL)-IR-31 at 1; and (c) Tickets by mail--the customer makes a reservation by phone and is mailed a prepared ticket and billed. JRC(TW)-IR-31. Another recent phenomenon is the use of contract bulk fares, where a contractor buys blocks of seats from a carrier at a discount and resells them to the public. To date these have played a minor role in marketing air transportation and have been used primarily in vacation markets and are often with vacation packages. Travel agents often ultimately sell individual seats earning a commission from the contractor. See, AA-12&13, UA-IR-60, OZ-CBF-1, and AF-100.

[28] As of October 31, 1981, there were 18,816 ATC accredited agency locations. ATC-T-1 at 53, ATC H-18 at 2. Generally the number of locations has been increasing at a rate of 10 percent per year. See I.D. at 40 n.2 and Appendix C Table 1. The number of IATA locations has also been projected to be over 20,000. Ruggiero (IATA) 57 Tr. 110. See also, IATA-IR-2 at 3.

Travel agents have assumed the primary role in the sale and promotion of air travel.[32] They provide ticketing and reservations services, frequently provide travel counseling on the best fares and services, and often promote air transportation sales through advertising and other means. Travel agents will usually sell other transportation services as well, including cruises, rail and bus transportation, and car rentals, plus travel related services such as hotels. They also sell travel packages in the form of tours and charters. Other services may include making arrangements for passports and visas, delivering tickets, providing travelers checks and providing travel insurance.[33]

Travel agents are not required, however, to perform most of these services. In fact, a significant number of agents concentrate on performing ticketing and reservations services for corporations.[34] Moreover, virtually all agents now have commercial accounts[35] and, as noted previously, sales to business travelers now account for about half of all travel agent sales.

The travel agent industry is experiencing a remarkable period of growth. The number of agencies has been increasing at the rate of about ten percent a year throughout the 1970's regardless of economic conditions.[36] This should be compared to the entry rate in other U.S. industries which has varied between .6%, during periods of economic downturn, to 4.7% in periods of economic recovery.[37] Moreover, the failure rate of firms in the travel agency industry is extremely low. The percentage of defaults and deletions from the list of accredited ATC agents is only about 3% per year. [38] The failure rate is far below that of other industries. [39]

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[29] 13 CFR 121.3-81e (1982).

[30] ATC-POA-1 at 1. This is consistent with a recent study of the travel agent industry which reports that 72% of travel agents do less than $2 million in sales. Travel Weekly, Harris Survey at 26, May 1982.

[31] ATC-POA-1 at 1.

[32] Malin (USAir) 10 Tr. 14; Buchanan (ATC) 36 Tr. 88; Palm (Republic) 52 Tr. 69, 84. See Appendix B.

[33] ATC-IR-900, 905 36 Tr. 88; ATC-T-1, p. 19; I.D. at 41.

[34] See Buchanan (ATC) 37 Tr. 128, Saunders (ATC) 44 Tr. 45.

[35] ATC-17 at 5, which states that in 1978 89% of U.S. travel agencies had corporate accounts.

[36] See I.D. Appendix C, Table 1.

[37] ASTA-20 at 33-34. See also ATC-T-1 at 34-35 and I.D. at 96.

The record does not disclose agent profitability. [40] Profitability comparisons with other industries would give some indication of whether travel agents are experiencing unusual returns. Absent such figures, we are left with the implication that travel agents as a whole are profitable enterprises because substantial numbers of persons continue to enter the industry, and few firms exit even in very difficult economic times.

The increasing importance of travel agents may be attributed to three principal causes. The first is obvious: the dollar volume of air transportation sales on which percentage commissions are based has increased significantly over the years. Between 1970 and 1980 certificated air carrier revenues increased from 9.3 billion to 36.5 billion dollars. [41] Travel agent sales of air transportation increased from, approximately, 2.95 billion to 18.1 billion. [42] The second reason is that during thatperiod, our decisions disapproving agreements fixing commission rates took effect. [43] Commission rates (and airline commission costs) have increased dramatically. The average commission rate on tickets processed through the ASP went from 8.3% in 1978 to 9.6% in 1981, a 15 percent increase. [44]

38/ Between 1974 and 1979 the percentage of defaults varied from between 2.5 and 3.7 percent. I.D. Appendix C, table 6 at 2.
39/ ATC-T-1 at 34-35.
40/ The only figures available are from the 1977 Touche Ross Study, commissioned by ATC and a number of travel agent associations. That study stated agent profitability to be .48% of sales. ATC-IR-900 at Exhibit B-2. The study is of limited value because the basic domestic commission rate has increased from 7 to 10%, an increase of almost 43%, since it was conducted. The overall increase in commission rates is somewhat lower because agents do, or have, received different levels of commission for in-plant sales, international transportation sales and tour or promotional sales.
41/ *See* Appendix C.
42/ The former figure is from ATC-17 at 4, the latter from ATC-18 at 2a.
43/ Order 78-8-87, August 17, 1978 and 80-2-33, February 5, 1980.
44/ *See* Appendix D. The 11% figure understates the increase in revenues to the average agent. For example, the dollar amount of commissions paid per agency location through the ASP increased almost 30% between 1978 and 1980. *See* ATC-18 at 1-2a.

Finally, with the deregulation of the airlines, fares have become much more complex and carriers enter and exit markets much more frequently. Accurate information on fares and services has become much more difficult to obtain. Consequently, travel agents are selling a greater proportion of all air transportation sales. Sales through air carriers' own sales outlets are decreasing on a percentage basis. 45/ In short, there has been a tremendous expansion in the need for travel agent services.

It should be noted that a significant portion of this new demand is coming from nondiscretionary travelers. Agent sales to nondiscretionary travelers, particularly to commercial accounts, are increasing at a faster rate than to discretionary travelers. 46/ Agents are capturing corporate accounts that previously dealt directly with the airlines and air carriers are paying commissions on sales previously handled directly. 47/

In recent years, then, there has been a period of incredible growth in the air transportation marketing industry. It has, of course, also been a period of tremendous change for air carriers as well. They have only begun to utilize the substantial freedoms granted them under the Airline Deregulation Act. The health of the travel agency industry must, in large part, be attributed to the increasing demand for agents' marketing services by both air carriers and the traveling public during this period.

HOW THE PASSENGER AGENCY PROGRAMS FUNCTION

Common accreditation, as we use the term, involves the use of agreements by competing air carriers to govern the selection and retention of common agents for the sale of air transportation services. The use of agents, rather than independent retailing outlets is, in significant measure, tied to the unusual character of scheduled air transportation. Unlike the sale of goods, air carriers retain responsibility for providing the services the retailer sells on their behalf. Moreover, the carrier is responsible for paying denied boarding compensation, assuming baggage liability, and so forth. 48/ As a result, the agency system appears more conducive to retention of such control than a system of truly independent sales outlets.

45/ Travel agent domestic sales as a percentage of total domestic sales increased from 38.4% in 1977 to 53% in 1979. I.D. Appendix C table 2 at 1.

46/ Between 1976 and 1978 travel agent sales to persons traveling on business increased 41%, while their sales to persons traveling for personal reasons or for pleasure increased 30%. See ATC-17 at 3.

47/ NPTA-T-1 at 26, 27 and Table 4.

48/ See BA-T-1 at 6-7..

To become an agent, a person must apply to ATC or IATA. 49/ The conferences will then examine the application to determine if it complies with their standards. ATC resolutions require applications to be processed in no more than 90 days, but most are approved or disapproved within 45 days. 50/ IATA requires that applications be processed within 60 days. 51/ Most of ATC's and IATA's accreditation standards fall into the categories of financial, honesty, personnel or competency, and locations requirements.

The financial requirements for ATC accreditation and retention on the agency list involve initially obtaining a performance bond of $10,000, subject to periodic adjustment based on sales volume up to a maximum of $50,000. If they are a department of a bank or have a net worth of at least $75,000 and a good credit rating, they need not adjust the bond penalty above the $10,000 minimum. After one year the agent may substitute a letter of credit for the bond. 52/ In addition, there is pending in this proceeding a proposal to require applicants and certain agents to execute a personal guarantee of performance.

Financial standards for IATA accreditation differ significantly from ATC standards. Applicants must have working capital (the difference between current assets and liabilities) in the amount of $15,000 or, if the applicant is a corporation, the investment of the principals of the agency must not be less than $20,000 in the form of common stock or capital paid in surplus. 53/ There is no bond requirement.

ATC's and IATA's "honesty" qualifications are quite similar. Basically, they preclude accreditation if there is a false statement in an application (ATC and IATA), the applicant is a convicted felon (ATC) or has been found guilty of willful violations of fiduciary obligations to the public or to airlines (IATA), has been adjudicated bankrupt (ATC) or has had a previous license suspended (ATC and IATA). The administrator may determine, however, after investigation, that the applicant can be relied upon to adhere to the terms of the agreement. 54/

49/ In response to inquiries ATC and IATA send letters explaining their standards in some detail. *See* ATC-H-3 and IATA-H-4. Only half of the number of persons making inquiries pursue the application process. Buchanan (ATC) 39 Tr. 15-17.

50/ ATC Resolution 90.3 §V.E. Buchanan (ATC) 38 Tr. 56-57. ATC resolutions at issue in this proceeding may be found at ATC-IR-201.

51/ IATA Resolution 802 §D(2)(f). IATA resolutions at issue in this proceeding may be found at IATA-H-3.

52/ ATC Resolution 90.3 §IV.C.

53/ IATA Resolution 802 §C(2).

54/ ATC Resolution 90.3 §IV.D.1., and 2. and IATA Resolution 802 §C(9), (10) and (15).

The ATC and IATA personnel experience requirements are divided into two parts. One part relates to the manager of the location, and the other to the person who will perform the technical, day-to-day duties such as ticketing. The manager must meet the following standards: (1) be employed for at least 35 hours per week at the agency location (ATC) or employed full-time (IATA); (2) exercise daily supervision and responsibility at the location (ATC); (3) demonstrate knowledge of the Travel Agents Handbook (ATC and IATA); and (4) have two year's experience as a travel counselor or manager (ATC and IATA). 55/

The technical experience requirements, which may be met by either the manager or any other employee of the agent, are: (1) the person must be a full-time employee staffing the location (ATC and IATA); (2) the person must have had at least one year's experience in airline passenger ticketing at an ATC carrier or a travel agent accredited by ATC or IATA (ATC) or one year's experience in an approved office or any airline office (IATA); and (3) the ticketing experience must have been obtained in the past three years (ATC and IATA). 56/

There are five standards applicable to a travel agent location: (1) it must be advertised, identified, and represented as an office for the sale of air transportation and related services (ATC) or identified as a travel agency (IATA); (2) it must be open and freely accessible to the general public for the promotion and sale of general travel services (ATC) or the sale of international air transportation (IATA); (3) it must be open for business on a regular schedule and no less than 35 hours a week (ATC) or in accordance with local business practices (IATA); (4) it must have facilities and arrangements for security of tickets and validation plates (ATC and IATA); and (5) it must be engaged solely in the promotion and sale of passenger transportation and general travel services (ATC). 57/

Each travel agent establishes a location which he wishes to be his central place of doing business. If the agent wishes to expand his operation to other locations, he is free to do so, provided the other locations meet the standards and are approved by the conferences. He can only do business at locations listed on the list of approved locations. In order to obtain accreditation of a branch location, the home office and branch must be the same legal entity, and the home office must have full legal and financial reponsibility for the branch office. One bond covers the home office and additional authorized agency locations under the ATC rules. IATA requires an additional $5000 in capital for each branch. 58/

55/ ATC Resolution 90.3 §IV.B.1, 2. and 3. and IATA Resolution 802 §C(3).
56/ ATC Res 90.3 §IV.B.4. and IATA Resolution 802 §C(4).
57/ ATC Resolution 90.3 §IV.A. 1., 3., 4., 5., and 6. and IATA Resolution 802 §C(5) and (12).
58/ ATC Resolution 90.3 §V.B.3. and IATA Resolution 802 §C(2)(a).

Under ATC rules, agencies located on customer premises--in-plant locations--must also be branch offices of an already established travel agency. However, an in-plant need not be open and freely accessible to the public, or meet the personnel and location standards. A customer or its officers or employees cannot control or have a financial interest in an in-plant agent. 59/ The IATA agreements have been revised to eliminate in-plants as a separate category of agency locations. Rather, all locations, including those on the premises of customers, must meet the same standards. In addition, the IATA resolutions prohibit approval of a passenger sales agency at an airport, while the ATC resolutions do not. 60/

Both the ATC and IATA agreements contain a number of other accreditation standards. Both include rules that are designed to preclude persons from becoming agents who would use a great deal of air transportation themselves. This aim is accomplished by prohibiting any person who would do more than 20% of his business with himself from becoming an agent. 61/

The ATC and IATA rules also involve a number of restrictions on the air carrier/travel agent relationship. The most notable of these precludes air carrier members from paying commissions on a ticket a travel agent writes for his own use. 62/

Upon conference accreditation an agent automatically represents all member airlines, unless an airline notifies the agent that the agent shall not represent that carrier (i.e., the airline does not "appoint" the agent). 63/ ATC provides agents that will settle accounts through the ASP blank ticket stock. They receive validation plates from individual carriers. 64/ Agents that will settle directly with carriers receive individual carrier stock from the carrier.

59/ ATC Resolution 90.3 §A., C.1. and 3.

60/ IATA Resolution 802 §C(14).

61/ ATC Resolution 90.3 §IV.A.8. and IATA Resolution 802 §C(5). The rules are, however, written differently and are described in more detail in the opinion to follow.

62/ ATC Resolution 90.3 §XXI.C.8. and IATA Resolution §802 §G(7). Both conferences permit a carrier to compensate an agency when an employee purchases a ticket for his own use.

63/ ATC Resolution 90.3 §VII.B. and IATA Resolution 802 §D(4)(6). Under the IATA agreements appointment is only automatic if a member has executed a general concurrence.

64/ When the plate is used to imprint a carriers name on blank ticket stock it becomes the ticket stock of that carrier. Distribution of validation plates is a matter of corporate policy. Many carriers distribute plates to all accredited agents. Others automatically distribute their plates to all agents located in cities they serve, and to any other agent upon request. Settlement procedures are more carefully discussed below in sections of this opinion dealing with the ASP.

The ATC and IATA rules also require that carriers only appoint conference approved travel agents as their agents. 65/ As a result, agents approved by the conferences are the exclusive agents of member air carriers.

LEGAL STANDARDS

Approval of agreements among air carriers is governed by the provisions of section 412 of the Federal Aviation Act, as amended. 66/ Section 412 as it now stands, is the product of extensive amendments made to its predecessor section by the Airline Deregulation Act of 1978. 67/ The most pertinent of those changes is the inclusion of a new, particularized antitrust standard which we must consider in addition to a public interest review. 68/

65/ Only agents whose names appear on an accredited agents list may be used. These provisions are dealt with in more detail in the following sections of this opinion.

66/ 72 Stat. 770, as amended by 92 Stat. 1729, 94 Stat. 39, 49 U.S.C. §1382.

67/ 72 Stat. 770, as amended by 92 Stat. 1731, 94 Stat. 47, 49 U.S.C. §1384.

68/ The pertinent portion of §412 reads as follows:

> "(2)(A) The Board shall by order disapprove any contract, agreement, or request filed pursuant to paragraph (1) of this subsection, whether or not previously approved by it, that it finds to be adverse to the public interest or in violation of this Act, and shall by order approve any contract, agreement, or request, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act, except that-
>
> > (i) the Board may not approve or, after periodic review, continue its approval of any such contract, agreement or request, or any modification or cancellation thereof, which substantially reduces or eliminates competition, unless it finds that the contract, agreement or request is necessary to meet a serious transportation need or to secure important public benefits including international comity or foreign policy considerations and it does not find that such need can be met or such benefits can be secured by reasonably available alternative means having materially less anticompetitive effects;
>
> * * * *
>
> (B) In any proceeding before the Board involving the application of the standards set forth in subparagraph (A)(i) of this paragraph, the party opposing the proposed contract, agreement, or request shall have the burden of proving the reduction or elimination of competition, and the availability of alternative means having less anticompetitive effects, and the party defending the proposed contract, agreement, or request shall have the burden of proving transportation need or public benefits.
>
> (C) The findings required by subparagraph (A)(i) of this paragraph, shall be included in any order of the Board approving or disapproving any contract or agreement, or any memorandum of any contract or agreement, of any modification or cancellation thereof, or any request.

Litigation in this case has focused upon the competitive effects test of section 412. While the agreements at issue could be scrutinized under the public interest standard, no one appears to be arguing we could confine our analysis solely to this pre-ADA standard.[69] There is apparently a consensus among the parties that our inquiry should concentrate on the effect these agreements have on competition. That is, in fact, what we have done in analyzing merger cases under section 408, which is very similar to section 412. Such an inquiry is clearly consistent with the intent of Congress.[70]

Section 412 requires a three part analysis that the Board must undertake in reviewing agreements. The competition test of §412 requires (1) an assessment of the agreements' possible harm to competition; (2) if the harm is substantial, the agreement can nevertheless be approved if necessary to obtain important public benefits or significant transportation needs, provided that (3) the benefits or transportation needs could not be served by reasonably available alternatives having materially less anticompetitive effects.

Our first inquiry will be much the same analysis as a court would undertake under §1 of the Sherman Act.[71] Only competition will be considered. We will weigh an agreement's procompetitive effects against any anticompetitive effects.[72] We can, therefore, use judicial precedent on Section 1 of the Sherman Act as a guide for determining if an agreement results in a substantial loss of competition.[73] Any public benefits an agreement may secure, or transportation needs it may serve, which could not be considered by a court under section 1, will be considered in the second stage of our analysis.[74]

69/ The parameters of the public interest test are set out in Orders 79-12-163/164/165 at 58-60.

70/ *See* S. Rep. 95-631, 95th Cong. 2d Sess. February 6, 1978 at 248-249. H.R. Rep. 95-1779 95th Cong. 2d Sess. October 12, 1978 at 76-77 October 12, 1978.

71/ 15 U.S.C. §1. That statute provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

72/ Courts only consider effects on competition and not asserted benefits not directly related to competition in determining if competition has been inhibited. *National Society of Professional Engineers v. U.S.*, 435 U.S. 679, 690 (1978).

73/ We adopted this approach in agreements cases in Order 80-4-113, April 15, 1980 at 8-9.

74/ Section 412 requires that we consider benefits or transportation needs. Such factors could not be considered in a case brought under the Sherman Act. *See e.g., U.S. v. National Association of Broadcasters*, 536 F.Supp. 149, 166-67, (D.C.D.C. 1982).

Our approach is consistent with Congress' directive that we rely on competition to the greatest extent possible.[75] The policy directive of the ADA establishes a clear presumption that competition can be relied on to serve the public interest. The same presumption--that market forces will optimize service and price options--operates in other industries.

Reliance on the marketplace as the means to optimize public interest is a well-established principle of U.S. antitrust law:

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestricted interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *Northern Pacific Railway Co. v. U.S.*, 356 U.S. 1, 4 (1958).

To the same effect is the recent Supreme Court case of *National Society of Professional Engineers v. U.S.*, 435 U.S. 679, 695 (1978).

> "The Sherman Act reflects a legislative judgement that ultimately competition will produce not only lower prices, but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.' *Standard Oil Co. v. FTC*, 340 U.S. 231, 248, 71 S.Ct. 240, 249, 95 L.Ed. 239. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain--quality, service, safety, and durability--and not just the immediate costs are favorably affected by the free opportunity to select among alternative offers."

Deregulation has always required a measure of faith that competition will produce the best outcome.[76] That is no less true in this case.

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[75] Subsection 9 of Section 102 of the Act states Congress' direction to rely on competition. It provides that the public interest includes "[t]he encouragement, development, and maintenance of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices, and to determine the variety, quality and price of air transportation services." 49 U.S.C. §1302. *See also* H.R. Rep. 95-779 and n.70 *supra* at 55, October 12, 1978, and S. Rep. 95-613, n.70 *supra* at 249.

[76] *See e.g.*, Orders 79-12-163/164/165, October 24, 1979; 80-6-1/2, March 31, 1980; and 80-10-66, August 14, 1981.

Section 412 also provides that opponents of an agreement have the burden of presenting evidence that it is anticompetitive. Proponents must present evidence on public benefits; opponents bear the burden of producing evidence on materially less anticompetitive alternatives.

IATA asserts that only "real", "hard" facts showing harm to competition satisfy the initial obligation of proof. In its view, an agreement cannot be disapproved on the basis of policy considerations or argument concerning an agreement's competitive effects. They would require that opponents of the agreements present direct evidence of exclusion and quantify the impact of their exclusion. [77/] IATA suggests this is the only reasonable interpretation of the burden of proof provision of §412.

IATA acknowledges that such direct evidence probably is not necessary if an agreement is a blatant--per se--violation of the antitrust laws. It insists, however, that none of the agreements have these effects, consequently empirical evidence is required.

BDA and DOJ maintain that they do not have to show "actual measurable harm", to meet their burden. In their view, any agreement can be anticompetitive as a matter of law. [78/]

Opponents need not present specific facts demonstrating or quantifying the precise reduction in competition. We have consistently held, and reaffirm that holding here, that parties may rely on economic testimony as well as established antitrust principles to carry their burden of proof. [79/] Quantification of the effects of an agreement that restrains the operation of the competitive marketplace need not be offered.

[77/] IATA cites a number of cases for the proposition that a finding of anticompetitive effects based on theory could not be sustained. IATA Brief to the Board at 23-24. IATA fails to recognize, however, that courts are increasingly striking down agreements using a truncated rule of reason analysis. They are being found unlawful on the theory that an examination of an agreement can reveal restraints that are unreasonable on their face. U.S. v. Realty Multi-List, Inc., 629 F.2d 1351, 1369-70 (5th Cir. 1980) and U.S. v. Columbia Pictures, Inc., 507 F.Supp. 412, 432 (S.D. Cir. 1980). In addition all cases involved were private suits seeking treble damages under section 4 of the Clayton Act, 15 U.S.C. With one exception, the court required this proof not to establish the existance of a violation of the antitrust laws, but to establish a causal connection between the alleged violation and the plaintiff's alleged injuries. The one exception was Hommel v. Ferro Corp., 659 F.2d 340 (3rd Cir. 1981). In that case the court was reviewing a plaintiff's allegation of price discrimination by a single competitor over a discrete period of time. Here we are dealing with virtually industry-wide agreements which have been in affect for almost 40 years. The courts, when faced with a practice that has been in effect over a long period of time, covering a substantial portion of the industry, have recognized that inferences of anticompetitive effect of an agreement may be drawn from its nature and scope.

[78/] BDA cites Orders 80-6-66 at 10 and 79-11-18 at 5.

[79/] IATA Show Cause Proceeding, Order 80-4-113, April 15, 1980 at 30 and Agreements concerning Intrastate Carrier Participation in the ASP, Order 79-11-18, November 1, 1979 at 5.

Courts have established that certain kinds of restraints that go to the heart of competitive behavior should be condemned without proof of whether they are effective in actually restraining competition. However, the opponents of the agreements do not rely solely on this antitrust theory of per se illegality. Rather, they also rely on evidence of the market dominance of the agreement participants and evidence that various provisions have been applied in a way that limits competition. If these predicates are established, detailed quantification is not required by courts in such situations because the anticompetitive effect is readily apparent. 80/

ASTA argues that we are obligated, under section 412, to balance the procompetitive and anticompetitive effects of the agreement as a whole in determining whether they substantially reduce competition. In its view, we cannot disapprove specific provisions of the agreements as anticompetitive.

This contention is not supportable under our §412 precedent or antitrust case law. As our discussion of the history of these agreements suggests, we have customarily analyzed the effects of individual restraints and have frequently disapproved portions of agreements submitted for our approval. 81/ Moreover, courts are seldom confronted with comprehensive agreements. Rather, parties usually challenge individual provisions that courts examine under Rule of Reason analysis to determine whether particular restraints unreasonably restrict competition. Courts look at the relationship of the individual provisions to any efficiencies produced by coordinated activity. Where they find efficiencies, individual restraints must be necessary to obtain them and not place a greater restraint on competition than is necessary to achieve those benefits. 82/

80/ See pages 40-43, infra. The facial unreasonableness theory is a reasonable corollary to per se treatment of agreements. It is founded on the view that a full-blown inquiry into the effects of some agreements is unnecessary because, once market power is proved, a substantial adverse effect on competition is unavoidable. See Sullivan, Antitrust 255, 256 (1977).

81/ Pan American-National Agreements, 28 CAB 960, 963 (1955); ATC Agency Resolution Investigation, 29 CAB 258, 266 (1959) affirmed sub nom McManus v. CAB, 286 F.2d 414 (2nd Cir. 1961), and Order 80-6-66, June 12, 1980. There is also a measure of inconsistency in ASTA's position. While it maintains we must reach a single conclusion on the agreements, it asks us to disapprove two specific provisions: towit, the IATA airport restriction and personal guarantee provisions. ASTA Brief to Board at 3 p. 7.

82/ U.S. Trotting Ass'n v. Chicago Downs Ass'n Inc., 665 F.2d 781, 790 (7th Cir. 1981); Realty Multi-List v. U.S., 629 F.2d 1351, 1372 (5th Cir. 1980); Smith v. Pro Football, Inc., 593 F.2d 1173, 1183 (D.C. Cir. 1978).

This approach clearly best serves the public welfare. It precludes the use of efficiency producing agreements as shields for conduct that contravenes the antitrust laws.[83]

With the passage of the Airline Deregulation Act, section 412 analysis must be viewed in light of the Sherman Act. That statute provides ample guidance on the types of agreements we should approve in the airline industry. While §412 provides us with discretion to look beyond the confines of the Sherman Act, it is clear that Congress intended that we exercise that discretion sparingly. Our concern should be, and is, primarily on the competitive effects of the agreements before us.

METHOD OF ANALYSIS

When we instituted this case, we viewed the conference agreements as representing a substantial departure from the competitive mode. In contrast to the distribution systems of other industries in which sales are predominantly through independent entrepreneurs, the air transportation marketing system is dominated by agents appointed pursuant to cooperative agreements. We initially suggested these agreements therefore may violate the antitrust laws.[84] As we have just outlined, we believe that the proper analysis under section 412 should focus on the individual aspects of the agreements. In this section, we will more closely examine the relevant antitrust principles which will govern our review of the agency programs.

As was recognized very early in the development of judicial case law under the Sherman Act, every contract or agreement concerning trade will restrain competition in some way. Restraining trade is the essence of contracts.[85] Obviously, not all contracts are illegal. Courts have interpreted the Sherman Act to ban agreements which are adopted for the purpose of reducing competition, or which have a significant tendency to reduce competition. Contracts that only incidently restrain competition are permissible.[86]

83/ This reasoning underlies the Supreme Court's decision in Arizona v. Maricopa County Medical Society, ___ U.S. ___, 102 S.Ct 2466 (1982), where the court struck down illegal price fixing provisions of agreements tied to a program intended to provide a community with an alternative health insurance plan. Antitrust commentors agree with this approach. Bork, The Antitrust Paradox, 335-337 (1978) and Sullivan, Antitrust ¶88 (1977). In fact, ASTA acknowledges this approach is the correct one in agreements cases. See ASTA Brief to Board at 25-26 and 39, citing Antitrust Advisor (2d ed., Supp. Liebler ed. 1981) at 30-31.

84/ Order 79-9-65 at 2-3 and 14-15. See also Order 70-12-165 at 14-15, ATC Agency Investigation, 29 CAB at 265.

85/ Chicago Board of Trade V. U.S., 246 U.S. 231, 238 (1918).

86/ Id. See Sullivan, Antitrust §63 (1977).

Courts reviewing agreements under the Sherman Act will not find agreements designed to increase efficiencies, and tailored to achieve such purposes, to be violations of the antitrust laws. Economic efficiency and competition are interrelated. Competition spurs competitors to make their production and distribution of goods or services more efficient. Competitive pressures induce firms to expand to the scale where they are most efficient and to eliminate economic waste. [87] Cooperative arrangements whose purpose and effect is to produce efficiencies can enhance competition.

Where an agreement has a mixture of competitive effects, courts will usually consider the agreement under the Rule of Reason doctrine, to determine whether conduct is significantly and unreasonably anticompetitive in character or effect. [88] Courts will consider all facts relevant in determining effects on competition, including the businesses involved, the nature of the restraint and its actual or probable effect and the purpose sought to be achieved. [89]

Courts in examining the competitive effects under the rule of reason will define a relevant market in which competitive effects are to be considered. They will not go through the vigorous definition of markets undertaken in monopolization or merger cases, but undertake a streamlined analysis establishing the parameters of competition affected. [90]

ASTA argues, and we agree, that the relevant market in considering these agreements is passenger air transportation in the U.S. They state that we must focus on the extent to which these agreements affect the price and supply of such services. If the impact of an agreement is to lower prices or increase supply, the public may be benefited by them.

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[87] Sullivan, Antitrust §59 (1977).

[88] Some types of agreements have such a pernicious effect on competition that courts will strike them down, regardless of the existence of alleged efficiencies. Arizona v. Maricopa County Medical Society, __ U.S. __, 102 S.Ct. 2466, 2477 (1982), citing U.S. v. Socony-Vacumm Oil Co., 310 U.S. 150, 224 n. 59 (1940).

[89] Chicago Board of Trade v. U.S., 246 U.S. 231, 238 (1918).

[90] See e.g., Optivision v. Syracuse Shopping Center Associates, 472 F.Supp. 665 (S.D.N.Y. 1979) and Brown v. Indianapolis Board of Realtors, 1977-1 Trade Cases ¶61,435 (S.D.Ind. 1977) The question is not whether participants have a monopoly in the relevant market but whether participants have sufficient economic importance that exclusion results in the denial of the opportunity to compete effectively on equal terms. U.S. v. Realty Multi-List, Inc., 629 F.2d 1351, 1373 (5th Cir. 1980) and sources cited therein.

The market position of the parties to the agreement must also be considered. The impact of a restrictive agreement on competition will, in great measure, depend upon the number or market position of parties to the agreement. A restrictive agreement between competitors is less likely to have a significant adverse effect on competition if there are a number of other producers to whom a purchaser can turn. For this reason, not all exclusive dealing arrangements are condemned under the antitrust laws. [91] But if the agreeing producers are the major competitors, or most producers are parties to the agreements, then a restrictive agreement may effectively preclude market alternatives and have a more significant adverse effect on competition. [92] In this case, we are confronted with agreements among virtually all air carriers.

Another consideration that enters into the antitrust analysis is the nature of the restraint. Economic theory teaches that competition suffers if firms can exercise market power, which is defined as the ability to decrease output or raise prices above the competitive level. [93] Courts have consistently held that agreements that directly constrain individual firm's decisions about price and output strike at the nervous system of our economy. [94] Cooperation in these areas is conclusively presumed to be unlawful without regard to the market power of the participants. At the other extreme are cooperative activities that are carefully designed to enhance individual member's decisionmaking. For example, exchange of information about past pricing or output data or the adoption of industry standards have often been sustained as long as the purpose and effect of such practices is to enhance rather than restrain competition. [95]

91/ Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

92/ See, e.g., Standard Fashion Co. v. Mayrene-Houston Co., 258 U.S. 346 (1922) (Although requirements contracts are generally lawful, an exclusive contract to supply retailers which together constituted 40 percent of the relevant market was found unlawful because of the portion of the market foreclosed.)and U.S. v. Realty Multi-List, Inc., 629 F.2d 1351, 1370 (5th Cir. 1980) (Exclusion of competitor from association with market power may create unjustified harm to broker and public).

93/ Section 7 of the Clayton Act is designed to prevent an individual firm from achieving this level of market domination through merger while section 1 of the Sherman Act focuses on contracts, combinations or conspiracies that seek to achieve this result directly or indirectly.

94/ U.S. v. National Ass'n of Broadcasters, 536 F.Supp. 149, 155 (D.C.D.C. 1982) and cases cited therein.

95/ Compare Eliason Corp. v. Natl. Sanitation Foundation, 614 F.2d 126 (9th Cir. 1980); Maple Flooring Mfrs. Ass'n v. U.S., 286 U.S. 563 (1925), with Radiant Burners, Inc. v. Peoples Gaslight and Coke Co., 364 U.S. 656 (1961); U.S. v. Container Corp. of America, 393 U.S. 333 (1969).

The relationships of the agreement participants in the chain of distribution can also influence the assessment of likely competitive effect. Agreements among direct competitors that seek to regulate competition at that level of production are referred to as horizontal restraints. [96] Vertical relationships involve firms at different levels of production or distribution as in the case, for example, of a manufacturer and a wholesaler. While there are no clear guidelines, horizontal agreements among competitors appear to be of greater concern to antitrust courts. [97] It has recently been suggested that vertically imposed restraints involving a single producer and its distributors do not pose significant competitive problems in the absence of market dominance. [98] In this case, proponents of the agreements seek to characterize these agreements as solely vertical while the opponents emphasize their asserted horizontal effects. It is readily apparent that neither view is entirely descriptive of the complex relationships among air carriers and travel agents.

The agreements at issue in this case are agreements between air carriers, that is to say they are horizontal agreements. However, their effects are both horizontal and vertical. As between air carriers, they restrain competition in the ways carriers distribute their products. Because the agreements set the terms on which air carriers will deal with agents, they have vertical effects. There are also horizontal effects at the agent level of distribution. By creating rules under which travel agents must operate, competition between agents is affected, as well as competition between agents and other persons who would distribute air transportation. [99]

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[96] There is a horizontal agreement when competitors agree directly or through the use of a trade association.

[97] Arizona v. Maricopa County Medical Society, __U.S.__, 102 S.Ct. 2466, 2475 n.18 (1982).

[98] See Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). In that case the court ruled that a producer could limit the territory in which distributors sold its product. While competition in the sale of that product (intrabrand competition) was reduced, that loss was outweighed by increased competition between that product and others (interbrand competition). GTE Sylvania possessed a market share of only 5 percent of national television sales. That case is of limited value here, however, because this case involves a joint decision by competitors in the air transportation industry on restrictions they will place on persons lower in the distribution chain.

[99] The fact that travel agent trade associations participate in meetings where changes to the programs are considered has led some parties to suggest that carriers may have been encouraged to adopt agreements with proscribed horizontal effects. DOJ Brief at 26-27.

Each effect on competition must be considered in determining whether an agreement substantially reduces competition. Both procompetitive and anticompetitive effects, at each level, must be considered in the balance. This task requires an extensive, fully developed evidentiary record. The parties to this proceeding and the Administrative Law Judge have provided us with such a record. [100]

As we have already suggested, the elimination of business rivalry with respect to the price or supply of air transportation is the type of effect with which we would be concerned. On the other side of the balance, we will consider the extent to which an agreement makes the market more efficient. If it does, it aids in the reduction of prices and the better allocation of resources. [101] This is the essence of the rule of reason analysis courts use in evaluating agreements under §1 of the Sherman Act and is the method of analysis we employ in this decision.

It must be emphasized, however, that the existence of pro-competitive benefits does not give competitors carte blanche to engage in coordinated activities. Courts will still void any restriction, by a combination or trade association with significant market power, if it lacks competitive justification or its reach clearly exceeds the combination's legitimate needs. [102]

COMMON ACCREDITATION

As was noted earlier, the original agreements establishing the passenger agency conferences were adopted to eliminate unqualified and dishonest persons from the air transportation marketing industry. [103] In the infant scheduled air transportation industry, it was believed that air carriers could not individually protect themselves in their agency dealings. [104] Given our regulatory responsibility to oversee the growth and development of the air transportation industry, we were willing to usurp the function of the marketplace and allow cooperative agreements to improve air transportation distribution. In essence, we concluded that the loss of competition was outweighed by the public benefits of improved competence and integrity of distribution outlets.

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[100] The existence of such an extensive record is another reason we have decided not to disapprove certain provisions on the grounds that they are *per se* illegal. All provisions will be considered under the rule of reason.

[101] *U.S. v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1364 (5th Cir. 1980).

[102] Id. at 1370.

[103] *ATC Agency Resolution Investigation*, 29 C.A.B. 258, 288 (1959) and ATC-T-1 at 5.

[104] *Id.* This stemmed directly from the developmental nature of air transportation at the time. Carriers could not afford to establish substantial in-house distribution systems. Because of the novelty of passenger air transportation, they could not individually obtain representation by established travel agents. Carriers had turned to questionable marketers as the only economic means of distribution.

However, the original agreements were not at all comprehensive and provided for substantial carrier discretion. Thus the original agreement, Agreement CAB 182 defined agent; excluded common carriers as qualifying for agency status; and provided for approval or disapproval of agents by majority vote of the agency committee. The agreement merely provided a mechanism by which individual carriers had their agents screened by ATC. [105]

Over time, detail was added to the resolutions and our regulatory role increased. Between 1951 and 1979 the basic ATC agreement was amended over 250 times. [106] In reviewing amendments to the programs, we began to focus upon air carriers' combined economic power. Our concern was that air carriers not abuse their economic power in their dealings with agents, especially in view of the protection from antitrust challenge afforded carriers by the then automatic conferral of antitrust immunity on agreements that we approved. [107]

By the time of the ATC Agency Resolution Investigation in 1959, we were disapproving provisions as abuses of concerted economic power. In that case we disapproved need and sponsorship provisions because they were not necessary to obtain the laudable objectives of the conference programs. [108]

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[105] See ATC-9 for text of the original agreement.

[106] ATC-T-1 at 8, 13. Sponsorship was the only requirement for accreditation in the original ATC program. ATC-9 at 3. In 1945 the ability to obtain a bond and certain honesty requirements were added as standards for accreditation. ATC-T-1 at 7. The rule precluding anyone doing 20% or more of his business with himself was added in 1959. ATC-T-1 at 44. Personnel standards and the modern bond requirement were added in 1961. ATC-T-1 at 9.

[107] In 1978, section 414 was revised to give us the discretion to withhold immunity on agreements we approved. Prior to that time, section 414 provided that immunity attached automatically to any agreement upon approval under section 412. *See* 72 Stat. 770 for text of section 414 before amendment.

[108] 29 CAB 258, 263 "This is not a situation, therefore, where we can grant to carriers on the basis of management expertise or discretion substantial freedom to make decisions without detailed Board supervision and control. Through the ATC system the carriers hold life and death power over the travel agencies, and it is unthinkable that the carriers should exercise those powers without providing ample opportunity for appeal." *Id.* at 264-65.

In fact, insuring that new provisions were fair to agents became our central concern in reviewing agreements. For example, we required ATC to assure procedural fairness to agents 109/ and precluded the use of conference power to resolve disputes between individual carriers and agents. 110/ Only recently have our decisions begun to focus on the need to increase competition in air transportation marketing. Perhaps the most important revision in this area was our decision to disapprove agreements setting commission levels air carriers could pay agents. 111/ We decided in those cases that we should rely on competition to dictate the level of compensation agents would be paid for their services. 112/

While the history of our regulation of the conferences demonstrates our recognition of the possibilities for abuse of the conference systems of agents, many of those same decisions recognized that there are efficiencies to be gained from the conference system. 113/

Even though the many provisions of the ATC and IATA passenger agency systems have differing purposes and effects, we can treat the systems generically and focus upon their essential elements. We begin by recognizing that over time the role of carriers in selecting agents decreased while the responsibility of the conferences was on the rise. 114/ With the adoption of blanket authorizations, persons approved by the conferences are now treated as appointed unless a carrier affirmatively acts not to appoint it. 115/

109/ *ATC By Laws Investigation*, Order 75-6-49, June 5, 1975 and Orders 76-1-11, January 5, 1976 and 76-5-57, May 14, 1976.

110/ Orders 79-8-134, August 29, 1979 and 80-6-101, June 17, 1980. Similarly, by Orders 79-3-178, March 27, 1979, and 79-7-202, July 30, 1979, we required changes in ATC dishonored check rules to reduce the burden they imposed on agents' immediate cash flow.

111/ Orders 78-8-87, August 17, 1978 and 80-2-33, February 5, 1980.

112/ "In our view, overall efficiency and lower fares are more likely to result from regulatory actions that increase the carriers' options for marketing air transportation than from efforts to stifle natural competitive incentives." Order 78-8-87 at 17.

113/ "[Our] approval has been granted in order to assist the carriers, among other things, to avoid the bidding up of individual commission rates in order to secure exclusive agency arrangements; to facilitate interline ticketing and impartial routing of traffic by qualified agents acting for more than one carrier; *to ease determination of credit qualifications of applicants and agents by providing a central clearinghouse for information; and to promote economy and efficiency for both agents and carriers by the use of uniform procedures for reporting, custody and remittance of revenues*." *ATC Agency Resolution Investigation*, 29 CAB at 262-63. Emphasis added.

114/ ATC-T-1 at 14.

115/ ATC Resolution 90.3 §§V.E. and VII.B. and IATA Resolution 802 §D(4)(6). Between 20 and 30 ATC airlines provide an agent with their plates after notice of its approval. ATC-T-1 at 16-17.

The delegation of the responsibility to screen applicants, monitor their activities and take enforcement action where conference rules are violated has resulted in the virtual integration of air carrier member marketing activities, at least through agents. By commonly delegating responsibility over agent distributors to their trade associations, carriers have eliminated duplication in the creation and oversight of their agent networks. Carriers, then, can take advantage of the inherent economies of scale of a system where costs are spread over a large base. The costs are shared with all the other airlines participating in the system. This integration is what we denominate "common accreditation" or "common appointments."

The cost of this system is very low. The costs of administration of the ATC program in 1980 were $1,413,428. 116/ In 1979 the cost of administration of the ATC program was about $100 per agency location. 117/ The cost of administration of the IATA program in the Western Hemisphere in 1979 was only $44 per agency location. 118/ The real cost of distribution, to an individual carrier, of course, is the total of all administration costs plus commission costs. Comparing the cost of airport ticket offices and city ticket offices, which generally handle primarily simple ticketing, the costs are only slightly higher. 119/

It has been argued that ATC's and IATA's role should be limited to collecting information on prospective agents. Air carriers could then make decisions based upon their individual standards. This system would certainly increase individual carrier's freedom in the appointment process. However, air carriers would have to assume the costs of reviewing the qualifications of individual agents, monitoring their agents' activities and enforcing their rules. Even the benefits of an in-place

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116/ ATC-18 at 2A-2B.

117/ ASTA-20 at 53. See also I.D. Appendix C, Table 7. The cost of administration to individual carriers per agent in 1978, based on contribution to ATC did not exceed $17.43. For 13 of 32 ATC members or associate members the cost was less than $1.00 per agent.

118/ ASTA-20 at 53, IATA-IR-75 at 2. I.D. at 97 n.1.

119/ Airline CTO costs for various carriers ranged from 4.1% to 8.5%, with an average of above 6%. NPTA-T-1 at 23. See Wilson (Ozark) 45 Tr. 83. Although these costs are well below average commission levels, carrier ticket offices do not come close to matching the geographic scope of the agency system. No carrier has more than 243 direct sales offices and for most carriers the majority of these are located in airports. See generally JRC-IR-10 and AA-IR-6, RC-IR-3, ASA-IR-4 and PA-IR-12.

distribution system would be lost as a carrier contemplating entry into new markets would have to review information on agents in the new market. In short, without collective standards, approval, monitoring, and enforcement all efficiencies except those relating to information gathering would be lost. 120/

Air carriers probably could not establish and oversee comparable marketing systems if they were required, as a result of this case, to individually appoint agents. 121/ Carriers would only do business with those agents with whom they did substantial amounts of business. 122/ Thus, under a common system there are far more distribution locations, providing information on fares and services to the public. Because there are more outlets, offering information on a wider variety of fares and services, competition among air carriers is enhanced. 123/

Common accreditation also facilitates intercarrier competition by reducing the cost of entering new markets. Even in cities far removed from a carrier's existing route system, there are accredited agents prepared to provide distribution services immediately upon notification of a carrier's decision to enter. A carrier can enter a new city, or provide service in a new market without incurring sigificant costs in establishing a distribution network. Similarly, carriers can freely exit without liquidating fixed assets. 124/

Travel agents benefit, as well. Common accreditation lowers the cost of entering into the marketing industry by eliminating multiple applications to airlines for accreditation. An agent only has to send in

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120/ We recognize, however, that the efficiencies of common accreditation could very well be obtained from an accreditation system operated by an independent third person, as DOJ once advocated. So long as the third person dealt with a number of carriers, accreditation costs would be spread over a wide base, without the concomitant fear that carriers would seek to restrain competition unreasonably. However, there are social and economic costs inherent in this approach and we prefer to avoid even the possibility of disrupting the air transportation distribution network, no matter how transitory this period would arguably be, unless we are persuaded that disapproval was the only way to enhance competition in airline marketing. DOJ has changed its position in its briefs to the Board and we presume that it now concurs in this assessment.

121/ See JRC(02)-T-1 at 3-4, Nesbit (Continental) 48 Tr. 88-91 and Fahy (American) 1 O.A. Tr. 196.

122/ See Blake (Eastern) 47 Tr. 81-82, RC-T-1 at 3-4. See also Nesbit (Continental) 48 Tr. 90; Palm (Republic) 52 Tr. 53; and Malin (USAir) 53 Tr. 86, for the proposition that a low percentage of agents sell the bulk of the carrier's tickets.

123/ The market is more like the perfect one where consumers have knowledge of all relevant information.

124/ Wilson (Ozark) 45 Tr. 131-32 and 46 Tr. 19-20, JRC)AL)-T-1 at 2-3.

one application, and meet one set of standards to become an agent for all the conference members. It can then offer the public a greater variety of air transportation services and spread its overhead over a much wider range of products. This increases competition, at the retail level, for consumer patronage. Since most agents sell the services of most air carriers, competition is enhanced in the sale of a single carrier's services, as well as in the sale of different carriers' services. 125/

The public is the beneficiary of common agents because they can secure better information about prices and services in the marketplace. In addition, consumers should benefit through the lowering of air carrier distribution costs. 126/

While these procompetitive effects are significant, any common accreditation system will also act to reduce competition in some ways. Uniform rules for accreditation, even within a program that is not exclusive, tend to chill individual carrier incentives to devise more efficient methods of distribution. Competition in air transportation marketing is defined by the rules of the conference programs. If passenger transportation distribution was the subject of individual carrier decisionmaking, each carrier would act in its own interests to maintain an efficient retail network to sell its services. Each would determine the kind of retailers that would meet its marketing objectives.

Our task here does not involve dealing with common accreditation concepts in the abstract. We must specifically examine the effects of the ATC and IATA programs. We find that the benefits that one would expect to result from these programs are significantly curtailed because of the existence of provisions which unnecessarily restrict competition. We do not believe, however, that the only way to address our specific concerns is to force carriers to start over, with the threat of antitrust exposure to prevent excessive restraints in a new program. Rather, with our phased removal of their exclusivity provisions and rules against dealing with certain kinds of ticket outlets, the behavior of carriers and agents participating in the ATC and IATA agreements will be subject to discipline of potential entry from other forms of marketers. In a relatively short time the standards of the programs will closely resemble those that would have developed in an unregulated environment. Market forces will, then, dictate the standards of the program. More important, the change will occur without eroding their competitive benefits.

Many of the accreditation standards now contained in the agreements would undoubtedly be retained in the same or similar form if carriers were to formulate individual standards. Standards that generally relate to personnel qualifications, financial capability, and reliability of agents and the rules governing security of standard ticket stock and reporting to

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125/ I.D. at 73-74.
126/ I.D. at 97-98.

the Area Settlement Plan appear to be narrowly related to legitimate business concerns about an applicant's qualifications and the efficient functioning of the ASP. To the extent that these particular standards are not unreasonable impediments to entry, interbrand competition among air carriers has been enhanced. In other words, the mere fact that carriers have imposed collective accreditation standards is not sufficient reason to disapprove the entire program of commonly accredited agents.

In fact, the primary thrust of the arguments against common accreditation is directed at provisions not directly related to the basic business qualification standards. In some areas, carriers have had a common interest, which is perhaps enforced by travel agents, to foreclose interbrand competition in the way that air transportation services are sold to the public. The exclusivity provisions are the most obvious example because air carriers agree among themselves that no airline will compete by marketing services outside of the accredited travel agent system.

EXCLUSIVITY

The principal provisions of the agreements that unnecessarily restrict marketing practices do not relate to the standards of the programs at all, but to air carriers' freedom to use other marketers. These exclusivity provisions do not themselves produce efficiencies nor are they necessary to achieve the efficiencies of common accreditation. Rather they constrain competition among airlines, between carriers and agents, and among marketing outlets. Industry-wide agreements with these objectives and effects are not tolerated under traditional antitrust policy. We have decided to disapprove them in a two step process. We will immediately disapprove the exclusivity provisions as they relate to a carrier's online ticket sales. Exclusivity, to the extent it applies to interline sales will be approved until December 31, 1984, unless individual carriers agree to allow non-accredited sales entities to write interline tickets.

A. What is Exclusivity

Both conferences have clauses in their agreements which prohibit their members from compensating non-conference approved agents for the sale of air transportation. [127] The practical effect of these provisions is to eliminate the use of other marketing outlets in the sale of air transportation. Besides direct sales outlets, there are very few persons other than accredited travel agents engaged in the sale of air transportation, and they sell only a very small portion of the scheduled air transportation sold in the U.S.

The principal nonaccredited agent marketers are bulk fare contractors. Bulk fare contractors negotiate with air carriers to purchase a portion of an aircraft's capacity at a discount price. They then resell the air transportation to the public, frequently in conjunction with hotel accommodations, tours and so forth. The benefit to the air carrier in these arrangements is that the contractors assume some portion of the risk of loss if a seat goes unsold. Air carriers believe the passing of this inventory risk is of significant value to them. However, the number of contractor arrangements that have been entered into is relatively small.

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[127] The ATC exclusivity clauses are as follows:

> An agent authorized by a member to sell domestic air transportation must operate from an authorized agency location included on the Agency list. Members will pay sales remuneration to authorized agents only. ATC Resoluton 90.3 §I.
>
> No member shall retain any person as its agent or any place of business as an authorized agency location unless such person and such location appear on the Agency list then in effect. ATC Resolution 90.3 §X.A.
>
> No commission shall be paid by or for a member to any person for the sale of domestic air passenger transportation, except: A commission paid to an Agent. ATC Resolution 90.3 §XXI.A.1.
>
> Buchanan (ATC) 36 Tr. 158-160 and 163.

The IATA exclusivity rules provide:

> [A] travel agency appointed by an IATA carrier to sell international air transportation must be an Approved Agent whose name and address have been entered on the Agency List. IATA Resolu-tion 802 §A(2).

IATA carriers will pay sales agency remuneration in accordance these Rules to Approved Agents only. IATA Resolution 802 §A(3).

> Ruggiero (IATA) 59 Tr. 166.

It is unlikely that more than a tiny fraction of scheduled air transportation is sold in this fashion. 128/

Some scheduled air transportation is also ticketed by high volume users. Corporations frequently establish their own travel departments to ticket air transportation for company employees. While these business travel departments often use the same reservations systems agents use, and perform much the same ticketing and reservations functions that some types of agents perform, they cannot be paid commissions. 129/

A number of other forms of ticketing were suggested in the record. However, very little ticketing is done by these alternate distribution systems and virtually all are alternate forms of direct sales. 130/ The record indicates, therefore, that very little ticketing is done by persons other than the air carriers themselves or conference approved agents.

The dominance of travel agents in ticketing airline services is not in itself objectionable. If this market position were achieved or persists solely because of the efficiencies of the existing distribution system vis-a-vis other options for purchasing tickets, there would be little basis for challenge under antitrust standards. However, with the exclusivity provisions in place we cannot find that this is the result of the normal operation of market forces but must instead presume that present industry-wide agreements are dictating marketing structure.

B. Exclusivity as a *Per Se* Violation.

The courts, in reviewing agreements under the Sherman Act, have concluded that some are to be conclusively presumed to be unreasonable restraints of trade simply by virtue of their obvious and necessarily adverse effect on competition. They are struck down, without regard to any alleged justification, because past experience demonstrates that their obvious purpose or effect is to significantly impede the normal operation of the marketplace. Such contracts are referred to as *per se* violations of the antitrust laws.

BDA and DOJ suggest that the exclusivity provisions have the same competitive effects as agreements the courts have treated as *per se* violations of the antitrust laws. While not advancing a *specific legal* theory, DOT also contends that it is readily apparent that exclusivity acts to reduce competition among carriers. DOJ maintains that the exclusivity

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128/ The carriers that engaged in contractor bulk fare arrangements generally do not have more than a handful of contractors. *See* sources cited at page 16 n.27, *supra*. For example, Ozark only uses *two* bulk fare contractors. Wilson (*Ozark*) 45 Tr. 107.

129/ *See* Buchanan (ATC) 36 Tr. 151-54; Wilson (Ozark) 45 Tr. 134-35. The *payment* of commissions to such persons are prohibited by the Conference agreements. ATC-IR-66 at 1. It is estimated that the BTD members of NPTA ticketed $303 million in air transportation in 1978. NPTA-T-1 at 24.

130/ *See* page 16, n.27, *supra*. I.D. at 38-39.

provisions amount to a collective refusal to deal with certain traders in the marketplace. It interprets the agreements to have the purpose and effect of limiting competition by protecting incumbent retailers--carriers and accredited agents--from competitors and by the imposition of favorable dealing terms. [131] It compares the agreements to those in Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., [132] which it interprets to stand for the proposition that standards designed to limit competition, by excluding firms from a market to the benefit of the parties to the agreement constitute *per se* violations of the antitrust laws.

A group boycott, as classically defined, is "a concerted attempt by a group of competitors at one level to protect themselves from non-group members who seek to compete at that level." [133] Where an explicit boycott occurs, a summary adjudication of illegality is warranted because the exclusion of competitors will injure competition and never produce benefits that cannot be obtained in less restrictive ways. [134]

The exclusivity provisions do not have the purpose or effect of keeping air carriers from entering the air transportation industry, or even from participating in the conference programs. [135] Entry into the industry at the level at which the agreement occurs is not foreclosed. Rather, the agreements preclude air carriers from dealing with persons on a different level in the distribution chain, except as provided for by the agreements. There are two effects on competition. First, competitive rivalry between air carriers in their distribution systems is circumscribed. Second, air carriers can use their combined economic power to structure relationships with their agents. [136]

131/ DOJ Brief to Board at 34-35.

132/ 364 U.S. 656 (1961).

133/ Smith v. Pro Football, Inc., 593 F.2d 1173, 1178 (D.C. Cir. 1978) and U.S. v. Columbia Pictures Industries, Inc., 507 F.Supp. 412, 428 (S.D.N.Y. 1980). "Typically, the boycotting group combines to deprive would-be competitors of a trade relationship which they need in order to enter (or survive in) the level wherein the group operates. The group may accomplish its exclusivity purpose by inducing suppliers not to sell to potential competitors, by inducing customers not to buy from them, or, in some cases, by refusing to deal with would be competitors themselves." 593 F.2d at 1178.

134/ Sullivan, Antitrust, §85 (1977).

135/ As was discussed earlier the effects of the agreements on the production of air transportation services, is the focus of our competitive inquiry. *See* pages 29-30, *supra*.

136/ There is possibly a third effect. If indeed travel agents have obtained significant economic power in their dealings with air carriers, travel agents may be able to exclude competitors at their level. This type of conduct would warrant *per se* treatment.

DOJ argues that the use of combined economic power to structure vertical relationships also has been found to be a violation of the antitrust laws. It cites the cases of Paramount Famous Lasky Corp. v. U.S., [137] and U.S. v. First National Pictures, [138] as instances where such agreements have been struck down.

Judge Yoder concluded, and we agree, that the exclusivity provisions do not warrant per se treatment. [139] The cases have not been interpreted to create a rule of per se illegality for such conduct. [140] While the Supreme Court only gave the agreements a cursory analysis, they do not fall within the classic definition of a group boycott. The harm to competition in those cases was somewhat different from that in a classic boycott. It involved the use of combined economic power to extract trade terms from persons with whom producers deal that could not be obtained individually in the free marketplace. In those cases, competitors were acting as a cartel, that is, they were engaging in concerted action to extract terms that a monopolist would extract. Since no legitimate purpose was offered to justify the agreements, they were struck down. [141] We conclude, therefore, that the exclusivity provisions would be subject to scrutiny under the rule of reason if examined by a court. [142]

137/ 282 U.S. 30 (1930).
138/ 282 U.S. 44 (1930).
139/ I.D. at 36 n.2.
140/ In those cases film distributors devised standard form contracts to be used in their dealings with exhibitors. In one case the challenged provision required film exhibitors to arbitrate disputes and in the other the challenged provision required exhibitors to provide security against default. In both instances film distributors agreed not to deal on different terms.
141/ Sullivan, Antitrust §90 (1977). Other cases often cited in this proceeding support a limited definition of the boycott rule. In Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), two distillers agreed to simultaneously change to a new distributor. They did so to take advantage of economies of scale. The court found the agreement not to be a boycott and subjected the agreement to scrutiny under the rule of reason. Similarly, in Deesen v. Professional Golfer's Association, 358 F.2d 165 (9th Cir. 1966) the court approved standards for participating in PGA events under the rule of reason.
142/ There is some case precedent, however, to support the proposition that exclusivity provisions are per se illegal. U.S. v. Columbia Pictures Industries, Inc., 507 F.S. 412, 428-29 (S.D.N.Y. 1980). See also ATC Agency Resolution Investigation, 29 CAB at 264-65 where we found that the ATC agency program would be in violation of the antitrust laws.

The fact that the exclusivity provisions will be considered under the rule of reason does not, however, establish any presumption of legality. While courts have upheld exclusive arrangements in some situations, [143] they have seldom allowed direct competitors to agree on the terms on which they would deal with persons at another level of distribution when the combined economic power of the participants would be sufficient to foreclose entry entirely or greatly restrict options in the marketplace. [144]

C. The Exclusivity Provisions Substantially Reduce Competition.

If the impact of agreements among producers of services is to lower price or increase supply, then on balance the public is benefited by them. However, as we have already indicated, the rule of reason requires that an agreement's various provisions relate to obtaining those efficiency objectives and place no greater restraint on competition than is necessary to obtain them. Close scrutiny is required to insure that the minimal possible restraint on competition occurs. Even where agreements improve efficiency, if the public would be better served by a less restrictive system achieving the same ends, the agreements must be disapproved. [145]

1. The effect of exclusivity is to reduce competition.

The most important effects of exclusivity are that it eliminates rivalry in air carrier distribution systems. It represents a surrender of the freedom to compete in the selection of sales outlets. [146] As one air carrier witness testified, its primary purpose is not to keep agents in line, but to keep a carrier's competitors in line. [147] Unless a carrier can convince all the carriers participating in the conferences that a non-direct marketing innovation is useful, it cannot be implemented. Any more efficient way of doing business is foreclosed if it cannot fit into the conference system. [148] Exclusivity, then, serves to deny carriers the flexibility to take advantage of persons who may serve the market even more efficiently.

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[143] See Jos. E. Seagrams & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969).

[144] The Paramount and First National Pictures cases clearly support this proposition. See also, Smith v. Pro Football, 593 F.2d 1173 (D.C. Cir. 1978); Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922).

[145] Realty Multi-List v. U.S., 629 F.2d 1351, 1372 (5th Cir. 1980); Smith v. Pro Football, Inc., 593 F.2d 1173, 1189 (D.C. Cir. 1978); U.S. Trotting Ass'n v. Chicago Downs Ass'n, Inc., 665 F.2d. 781, 790 (7th Cir. 1981). Hospital Building Co. v. Trustees of Rex Hospital, 51 L.W. 2269 (4th Cir. Oct. 19, 1982). ASTA recognizes this. This is also our consistent interpretation of the analysis required under §412. See e.g., UATP Agreement, Order 80-6 66 (June 12, 1930).

[146] Rein (IATA) 1 O.A. Tr. at 91-92, 104. See also Ruggiero (IATA) 60 Tr. 80.

[147] Malin (USAir) 53 Tr. 53. See also Wilson (02) 45 Tr. 103-04.

[148] TKTN-T-3 at 21, Banks (NPTA) 80 Tr. 60-62, NPTA-T-1 at 41-42, DOJ-RT-1 at 11-17, Gellman (ATC) 36 Tr. 22-23.

The collective agreements also diminish innovation. Specialization, while not entirely foreclosed, is substantially chilled. 149/ Agents who may conclude that they could more efficiently serve portions of the market in ways not permitted by the programs cannot contract with carriers outside the programs in order to implement their marketing strategies. Of course, persons who do not wish to become ATC or IATA agents are denied the same opportunities.

It is not sufficient to say that a carrier wishing to try a new approach may simply drop out of the agency program. Doing so would mean losing the efficiency benefits of common accreditation. Methods of distribution which may be more effective when used in conjunction with the common accreditation program will not necessarily save carriers money if their use requires abandonment of the joint agency system. 150/

Exclusivity now operates to eliminate the threat that a competitor will devise a better distribution system. This is not an insignificant portion of the price of air transportation. Distribution costs account for approximately 10% of the costs of air transportation services. Throughout our economic system, the threat of potential entry is relied upon to discipline the behavior of the participants in the marketplace. If conditions for effective competitive alternatives are foreclosed the price of a product or service tends to rise. Because exclusivity prevents entry into air transportation distribution systems, there can be no assurance that consumers are receiving the best service at the lowest price. 151/

Several parties have argued that there is evidence that commission costs are higher than they might be were the agency programs subject to the disciplining effect of potential entry from nonconference marketers. In this regard, commission rates have increased dramatically in the past three years, 152/ and there has been substantial entry and little exit from the travel agency industry, 153/ even in the midst of an industry recession. In addition, several carriers have recently attempted unsuccessfully to unilaterially lower their commission rates. These efforts appear to have failed because carriers now recognize that everyone will have to lower their rates if one carrier is to do so without significantly adversely

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149/ TKTN-T-3 at 26; NPTA-T-1 at 6-8; DOJ-T-1 at 11-13; Guerin-Calvert (DOJ) 84 Tr. 75-77, Banks (NPTA) 80 Tr. 61.

150/ *Columbia Broadcasting System v. American Society of Composers*, *on remand*, 620 F.2d 930, 935 (2nd. Cir. 1980).

151/ TKTN-T-3 at 21-26, NPTA-T-1 at 23-32 and 40-42, DOJ-T-1 at 10-11, DOJ-RT-1 at 18-20, Guerin-Calvert (DLJ) 83 Tr. 115-17. It does not matter if the travel agents rather than the air carriers receive the benefits of this conduct. The net cost is to the public.

152/ *See* Appendix D.

153/ *See*, pages 17-18, *supra*.

affecting its marketing program.[154] This problem may be traced to our decision to bar collective carrier action on commission rates without permitting different forms of entry.[155] That decision appears to have distorted the normal operation of the marketplace.

The proponents of the agreements respond with the observation that there are a large number of persons becoming agents each year. These new agent outlets compete with existing outlets for sales and insure that air transportation distribution costs remain at a competitive level. The weakness in this argument is that it ignores the many constraints the agreements place on the way agents can market the air transportaion product. Competition can occur only within the bounds set by the conferences. Agents know precisely what form their competition will take, and so are under less pressure to control costs and tailor service to customer demands.[156] In fact, one of ASTA's admitted concerns with the

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154/ In February 1980 United attempted to establish a flat fee system for compensating agents with the advent of open commissions. Following substantial adverse reaction from agents, the plan was abandoned after only about two weeks. NPTA-T-1 at 17. The witness suggested that the importance of travel agents to carriers under the existing exclusive system, in part, contributed to United's rapid reversal. Banks (NPTA) 25 Tr. 68-70. However, ASTA submitted evidence to show that any loss of sales to United was the result of individual agency decisions ASTA-R-1 at 7, and that traffic declines did not come from agents ticketing away because many of its competitors also experienced declines in that period. ASTA-R-5. In April 1982, five carriers made an aborted attempt to reduce commissions from 10 to 9 percent. The record is unclear as to why the effort failed. E.g. Ruden (ASTA) 1 O.A. Tr. 153. (The experiment was too short-lived for carriers to know the effect on bookings). Huisentruitt (ATC) 1 O.A. Tr. at 40. (Record evidence indicated that carriers meet each others commissions). Huisentruitt 1 O.A. Tr. at 57. (Carrier who lowers itscommission will lose its share of the market, if competitors on a route don't follow suit). Seybold (ATN) 1 O.A. Tr. at 190-191. (Rollback didn't stick because carriers believe existing level was proper). Fahy (AA) 1 O.A. Tr. at 206. (Reduction did not stick because other carriers didn't match). Fahy 1 O.A. at 208. (American waited to see if large carriers would follow suit on rollback before acting).

155/ In 1980, commission expense to carriers amounted to more than $1.5 million, an increase of 30 percent since fixed commissions were eliminated. 5 Tr. 113. In the year following that decision, commission expenses increased 163.8 percent. This does not suggest that we must revert to fixed commissions or that travel agents have as a group extracted monopoly rents. However, we cannot ignore the potential that foreclosing entry has resulted in commission rates above competitive levels.

156/ DOT-J-1 at 10-11, DOJ-RT-1 at 18-19, Guerin-Calvert (DOJ) 83 Tr. 115-117.

elimination of exclusivity is that it could lead to as yet unknown forms of competition and that all competitors will not be on the same competitive footing.157/ As long as exclusivity is in place, disciplining entry outside the conferences is eliminated.

Moreover, it should be recognized that the programs create a commonality of interests among all agent participants. Each agent has the same economic interest vis-a-vis the airlines. Each agent also has an interest in keeping fellow agents from gaining any marketing advantage it does not have or does not choose to exercise. 158/

157/ Bessel (ASTA) 69 Tr. 20 and 22.

158/ An agent "can do as much or no more than any other agent." Saunders (ATC) 40 Tr. 93. A related legal argument for disapproval of the existing programs, especially exclusivity, relates to travel agents' ability to influence air carrier marketing decisions. It has been suggested that our willingness, in the past, to intervene on travel agents' behalf to prevent abuses of air carriers' combined economic power may have actually served to shift significant power into the hands of travel agents.

Because of the substantial portion of transportation sold through agents, air carriers are careful to take into account agent reactions to their marketing decisions. There were numerous examples in the record of carrier marketing decisions in which agent reaction was an important factor in air carrier decisions concerning their distribution systems. E.g. ATC-JRC (RW)-5 at 4, 10; AA-IR-19 at 3; Kelly (NPTA) 23 Tr. 190, 191 and 24 Tr. 10,11; Eichner (TKTN) 76 Tr. 81-82 and Wilson (OZ) 45 Tr. 92. The ability to speak through trade associations and give the appearance of unified positions may well enhance travel agent influence. The conferences provide a variety of mechanisms for formal participation by recognized agents associations and others. See e.g., ATC-IR-31 at 1. Both ATC and IATA have established joint agent-carrier committees which propose and review conference action affecting the agency programs. (ATC Resolution 90.20 §XIII; IATA Resolution 840). The Travel Agent associations have used their ability to participate through these resolutions to achieve a number of changes which they consider to be beneficial, such as removal of ATC ban on UATP commissions and its airport and hotel location restrictions, and consider themselves to have this ability to influence carriers. (E.g. Bessel (ASTA) 69 Tr. 90, 99, 125). In addition agency groups communicate with carriers outside the formal conference mechanism. Shortly after the Board proposed to sever marketing exclusivity from ATC's fixed commission agreements, ATC circulated a mail vote to rescind exclusivity. That was a staff proposal based on the staff's view that ATC members still felt that it should be considered in the show cause proceeding. Buchannan (ATC) 38 Tr. 81-83. Air carriers immediately received strongly worded letters and telegrams from most travel agent organizations. ("We will not accept an industry program that leaves carriers free to deal with third party sales intermediaries outside of that program.") ATC-IR-70 at 9 setting out an

2. Virtually All Carriers Participate.

If a number of air carriers did not belong to the ATC and IATA programs our concerns about the competitive effects of common accreditation might be mitigated. Disciplinary pressure on distribution systems might come from marketing innovations of non-conference carriers who do not participate in the conferences. The marketing innovations of nonconference carriers, by lowering these carriers' costs, would be a spur to innovation within the conferences. Because they must compete, conference carriers could not then ignore nonconference innovations producing more efficient and less costly marketing systems. An alternative provider of marketing services, while cut off from dealing with conference members, could sell his services to nonconference carriers.

In order for this effect to be significant, however, the number and market position of non-conference carriers or marketing outlets must be great enough to impact the conference systems. That is not currently the case here. The 24 members of ATC, and 4 associate members, constitute virtually every major air carrier providing air transportation service in the U.S. The more than 100 members of IATA include almost every air carrier with operations to the United States. 159/ As such, the parties to

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158/ (Cont'd)
ARTA Telex; ("Passage of mail vote"...would have gravest of implications for air carriers and travel agents.") UA-IR-18G at 10 setting out an ASTA mailgram. ("In particular, we object to any change that would permit air carriers to pay a form of compensation to any person other than an accredited travel agent.") ATC-IR-70 at 7 setting out a AAA letter. The mail vote was defeated 15-5 with 4 absentions.

Travel agents' ability to participate in conference deliberations and to influence air carrier marketing decisions is of concern, because, to the extent it exists, travel agents could act to exclude new forms of marketers who might compete with them. Agreements with the purpose or effect of excluding competitors have generally been considered to have a pernicious effect on competition. Group boycotts are considered to be *per se* violations of the antitrust laws. *Klor's v. Broadway Hale Stores*, 359 U.S. 207 (1959).

However, we cannot conclude on the basis of this record that travel agents have the power to exclude competitors. The decision not to use other marketers is the decision of the carrier participants in the conferences. Although agents participate they do not vote. They have adopted the rules that preclude the use of other marketers. However, one of ASTA's current concerns is to give travel agents a vote on agency matters. JRC(TS)-IR-5. Should this come to pass, our assessment might be different.

159/ ATC-IR-3A. IATA-IR-3 at 3-7. Five carriers are members of both conferences. I.D. at 1 and 46, n.5.

the conference agreements have overwhelming market positions. Their conduct is not likely to be disciplined by the few small carriers that may choose to adopt alternate marketing systems.[160] This also means that potential distributors of air transportation services that do not conform to the conference standards are foreclosed from the distribution industry.

This is in marked contrast to situations in which exclusivity provisions have generally been upheld. In those cases, alternate sellers or buyers were present to discipline the behavior of parties to the agreements and persons cut off from dealing with parties to the contract had other avenues open to them to enter the marketplace.[161]

3. Most Marketing Alternatives Are Excluded.

The extent to which the exclusivity provisions injure competition also depends on the extent to which persons are excluded from the programs. Parties have argued, in this regard, that the standards for becoming an agent are really quite low. They cite the fact that 95% of all applications for accreditation are granted.[162]

While we believe many of the standards of the programs reflect areas of legitimate concern in appointing agents, the record does not demonstrate that these are the minimal standards air carriers would accept. In fact,

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160/ For example, Southwest Airlines' ticknet experiment was not adopted by any conference carrier. Nor was World's use of Ticketron followed. See Schmitt (TKTN) 74 Tr. 64-65.

161/ Proponents of exclusivity rely on a series of cases in which purely exclusive dealing contracts or contracts allowing existing shopping center tenents to reject applicants for shopping center space have been sanctioned. In most of these cases, however, the courts explicitly found that the parties involved represented such a small share of the market, that the challenged provisions did not foreclose the excluded person from the market entirely. See e.g., Oreck v. Whirlpool, 579 F.2d 126, 128-29 (2d Cir. 1978). (Manufacturer who terminated dealer's exclusive contract had only 1% of relevant market and other sources of supply were available); Westpoint Pepperrell Inc. v. Rea, 1980-2 Trade Cases ¶63,341 at 75, 743 (N.D. Cal. 1980) (alternate sources of supply were available). Optivision v. Syracuse Shopping Center Associates, 472 F.Supp. 665, 667 (N.D.N.Y. 1979) (optician excluded from shopping center had alternative commercial real estate available to lease.) C&K and J&K Inc. v. Fairway Shopping Center, 1980-2 Trade Cases ¶63,509 (Ohio Sup. Ct. 1980); Dalmo Sales Co. v. Tysons Corner Regional Shopping Center, 308 F.Supp. 983 (D.D.C. 1970) aff'd. 429 F2d 206(D.C.Cir.) and Jos. E. Seagrams & Sons. Inc. v. Hawaiian Oka & Liquors, Ltd., 416 F2d 71 (9th Cir 1969). Cf. Cartrade, Inc. v. Ford Dealers Advetising Ass'n of S. Cal., 446 F2d. 289 (9th Cir. 1971). (The court found that the purpose of the agreement was not to foreclose competition).

162/ See I.D. Appendix C, Table 6 at 1.

the testimony of record is that the programs do not reflect the level of qualifications individual carriers might require. [163] Moreover, the essence of the programs is to exclude. They set financial standards for prospective agents, personnel standards and location standards for becoming agents. Some persons and some ways of doing business are precluded from the program altogether. [164]

The 95% conference approval rate does not show the real effect of the conference standards. In fact, ATC receives twice as many inquiries on how to attain agency status as they receive actual applications. [165] The letters sent in response to inquiries explain the requirements of the programs in great detail. Persons cannot be realistically expected to undertake the cost and effort of applying for agency status knowing full well that their applications will not be granted.

ARTA argues that exclusivity does not in fact exclude any marketers except unqualified persons. In order to accept this view, we would have to be convinced that the existing accreditation standards are the minimum qualifications that each airline would be willing to accept before it would allow a person to write tickets. Judge Yoder implicitly rejected this argument when he found that marketers such as Ticketron and HATA had proposed viable business plans but were nonetheless excluded from selling air transportation. Moreover, other qualified businesses such as American Express and indeed ARTA itself have attacked specific provisions of the accreditation and retention standards which they believe to go beyond minimum business qualifications. Finally, as we have observed, airlines deal with presumably qualified persons such as bulk fare contractors and BTD's that do not meet all of the accreditation standards. We cannot therefore conclude that only unqualified sales outlets are now excluded from the marketplace. [166]

D. Disapproval of Marketing Exclusivity would not Eliminate the Potential Anticompetitive Effects.

The Initial Decision of Judge Yoder implictly recognized the need for disciplining alternatives to the conference programs. The disciplining force he envisioned was a group of persons acting in a non-agency capacity. In that group he placed Ticketron which he concluded had shown itself to be a viable alternative to travel agents. 167/ He would not permit persons to enter the industry in an agency capacity, however, on the grounds that if air carriers could deal with other agents the benefits of the common accreditation programs would be threatened. As we will discuss more fully below, we believe the Judge's fears are unwarranted. Before we do so we will consider whether the disciplining effect of non-agent marketers is sufficient to insure the competitive performance of the air transportation distribution industry.

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[163] See Pfaff (American) 56 Tr. 129-32, Wilson (Ozark) 45 Tr. 59-63 and Nesbit (Continental) 48 Tr. 87-88.

[164] Persons who would do business primarily on their own account cannot enter, nor can persons who wish to provide services only on a part time basis, or only by phone.

[165] Buchanan (ATC) 39 Tr. 15 and ATC-T-1 at 54. Rein (IATA) 1 O.A. Tr. 89.

[166] See p.66, infra for individual carrier statements on minimum qualifications standards for conference agents.

Judge Yoder's distinction between agent and non-agent marketers is based on the view that the ATC agreements contain two types of exclusivity. The first, "agency exclusivity", prohibits a principal--sales agency relationship between an airline and any person other than an accredited agent. The second, "marketing exclusivity", prohibits the payment of sales remuneration or commission to any person, except accredited agents. 168/

Judge Yoder believed that with the disapproval of marketing exclusivity some new forms of distribution would arise. For example, if a person provides ticketing equipment for airlines to use, or space in which to place ticketing equipment on their premises, Judge Yoder believes airlines should be free to compensate such persons in any way they choose, including payment of commissions. At present, Judge Yoder believes such alternate non-agent marketers are prevented from doing business with ATC airlines only because of marketing exclusivity.

While we appreciate the judge's efforts to formulate a means of permitting entry, we have a number of reservations about the efficacy of the approach he adopted. As the Judge envisioned the group of non-agent marketers, they would merely dispense tickets without representing all airlines or giving travel advice. 169/ Other parties have interpreted his opinion even more narrowly. For example, IATA believes that such a distributor would have to dispense tickets in its own name and to undertake responsibility for performance to make it clear to the public that the distributor was not acting in an agency capacity. 170/

167/ I.D. at 66-68.

168/ IATA only has an agency exclusivity provision. The ALJ recommended that agency exclusivity provisions be approved and that marketing exclusivity be disapproved.

169/ I.D. at 67.

170/ Rein (IATA) 2 O.A. Tr. at 18. This would make the seller an indirect air carrier. Ticketron's arrangement with World was not that of indirect air carrier but what IATA would consider to be an agency. World, not Ticketron, was responsible to the passenger.

No one has been able to state exactly when a person becomes an agent. It has been maintained that what is an agency is governed by (1) the legal definition of agency; [171] (2) by whether inventory risk passes; [172] (3) by whether the person gives travel advice; [173] and (4) by the facts of the particular transaction. [174]

The suggestion that entry should be determined by reference to common law principles of agency would preclude virtually all marketing innovation. Agency relationships can be created when a person is authorized to act on another's behalf and could be applied to bar any marketer that seeks to represent a carrier in its dealings with the public. [175]

Even if a common law definition were not used, the category of non-agent distributors the Judge envisioned would be very narrow. Agency exclusivity would prohibit the new retailers from assisting purchasers by providing advice on the various fare and service offerings in a market. Apparently, passengers would have to know beforehand where and with which air carrier they wished to travel. When agency exclusivity is viewed in this way, it is unlikely that the new marketer could, except in rare circumstances, deal with more than one air carrier.

The evidence on the record suggests carriers interpret "agency" to be a broad concept. American informed Hotels-Auto Tour-Air (HATA)--one of the potential entrants identified in this case--that it could not deal with them because it would be an agent. [176] ATC now maintains that HATA can be compensated as a nonagent. However, the ALJ found that with his modification, that HATA could only be paid for providing translation services, but not for making reservations. [177] Similarly, to avoid conflict with the agency programs they would have Ticketron enter in a certain way. It could be compensated for some activities, like ticket distribution, but not others, like counseling. The weight of the evidence, then, suggests very little room exists beyond the agency programs for carriers to deal with new types of marketers.

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[171] Buchanan (ATC) 37 Tr. 66, 135-38.

[172] Gellman (ATC) 34 Tr. 118-21, Rein (IATA) 1 O.A. Tr. 99-100.

[173] Rein (IATA) 2 O.A. Tr. 15-16.

[174] Buchanan (ATC) 38 Tr. 96.

[175] *See* Restatement (Second) of Agency (1958) Courts determine the existence of an agency relationship based on a factual consideration of the constituent elements of the agreement, whether there is representation, a fiduciary relationship and the degree of the principal's control and not on whether the parties describe their arrangement as an agency. *Ford v. Willys-Overland*, 147 SE. 822. Indeed, some courts have considered the travel agent to be the agent of the purchaser. *Simpson v. Compaigne Nationale Air France*, 248 N.E. 2d 117 (1969). *Antar v. TWA, Inc.*, 320 NYS 2d 335 (1970); *Bucholtz v. Sirotkin Travel, Ltd*, 363 NYS 2d 415 (1974).

[176] BDA-H-11. 79 Tr. 14.

[177] I.D. at 60.

The Judge's disapproval of marketing exclusivity, therefore, may produce little, if any, realistic possibility of entry by new forms of marketing. More important, there would be no threat that a new marketer could compete with travel agents in distributing fare and service information, which is probably the most important role they perform today.

Moreover, the distinction Judge Yoder proposed has also been attacked as artificial and not fully supportable on this record. While it was accepted in the early part of this proceeding, it was later abandoned because the ASTA, ATC and IATA witnesses all recognized that the ATC exclusivity provision had had the same effect in the marketplace as the IATA provisions. 178/ In fact, ATC has labelled the creation of a new classification of "non-agent ticket distribution" "a fiction without legal precedent". 179/

In addition, if marketing exclusivity precludes the use of non-agents to sell air transportation, it should have precluded the use of any alternative retailing system, particularly contractor bulk fares, where the contractor has assumed very little inventory risk. It has not. 180/ Similarly, the absence of marketing exclusivity has not resulted in IATA carriers' use of non-agent marketing outlets within the U.S. 181/ Judge Yoder was sufficiently uncertain about this distinction that he recommended that, in addition to disapproval of marketing exclusivity, Ticketron be given a specific exemption to provide services. 182/

Distinguishing between agent and non-agent distributors also presents a number of practical difficulties. The retention of "agency" exclusivity would require continuous screening of persons wishing to enter the marketing industry to determine whether or not they would create agency relationships with carrier members.

At first the screening would be done by the carriers. Because of the absence of any clear concept of agency, airlines would be reluctant to use marketers because their relationship might run afoul of the exclusivity

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178/ Bessell (ASTA) 70 Tr. 29, Gellman (ATC) 36 Tr. 25-26 and Person (IATA) 53 Tr. 158 respectively. As the presiding judge recognized, no party argued to him in their briefs that there was a distinction between the exclusivity provisions. I.D. at 82.

179/ ATC Brief to Board at 3-6.

180/ Buchanan (ATC) 38 Tr. 88-105.

181/ Gellman (ATC) 36 Tr. 25. The fact that British Airways considered the use of Ticketron means nothing. Ticketron spoke with several ATC member carriers in the same period. Schmitt (TKTN) 74 Tr. 65.

182/ In fact, the relationship between Ticketron and a carrier would probably be that of a principal-agent at law. Generally, anyone who is authorized to act on another person's behalf is an agent. Restatement of Agency (2nd) §15(1958).

provisions. 183/ Non-agent marketers might well be unwilling to undertake the costs of determining the exact circumstances under which they could enter and of pursuing an uncertain course of action.

Moreover, a carrier's individual decision to deal with a person outside the accredited system would be subject to challenge before ATC and IATA. Persons wishing to deny a new marketer the opportunity to enter, or merely delay its entry, could approach ATC or IATA asking for a determination of whether an agency relationship is created. Other air carriers would then have an opportunity to disapprove the use of the new distribution system.

The last recourse, should a conference find the person to be an agent, would be to ask the Board if we intended to permit that form of marketing. We would, then, have to assume a larger regulatory role than we now perform, i.e., screening the types of marketers air carriers can use. We prefer to leave it to the marketplace to determine who should distribute air transportation and in what circumstances. 184/

E. Exclusivity is not Necessary to Preserve the Benefits of Common Accreditation

Proponents maintain that the exclusivity provisions are essential "to

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183/ That is, in fact, what occurred when Hotels-Auto-Tour-Air approached American Airlines to provide translation services. See page 51, *supra*.

184/ At oral argument counsel for Ticketron observed that the examination it underwent in this case to prove its viability to distribute tickets was more extensive than that which new airlines undergo in Board proceedings. Cullen (TKTN) 1 O.A. Tr. at 220.

prevent circumvention of the standards". [185] This argument takes three forms. They argue that, absent exclusivity (1) carriers will not use agents accredited by ATC and IATA; (2) agents will have no incentive to enter the air transportation marketing industry through the ATC and IATA programs; and, (3) carriers will appoint unqualified marketers.

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[185] ASTA and other parties have cited a variety of cases in which joint venturer's rights to set standards have been upheld for the proposition that exclusivity is not anticompetitive. While all their cases uphold the use of standards for entry into joint activities, none of them establish the proposition that the need for standards in the association justifies an exclusivity provision that precludes members from dealing outside the association. Thus, in the real estate listing cases, the courts found that members were permitted, and in some cases encouraged, to deal with their own listings outside the listing service. Brown v. Indianapolis Board of Realtors, 1977-1 Trade Cases ¶61,435 (S.D.Ind. 1977) at 71612 and Iowa v. Cedar Rapids Board of Realtors, 1980-1 Trade Cases ¶63,713 (Iowa Sup. Ct. 1981) at 77042. In addition, in neither real estate listing case, did the listing service cover more than 20 percent of the market. In E.A. McQuade Tours v. Consolidated Air Tour Manual, 467 F.2d 178 (5th Cir.1972), the manual rejected publication of tours with certain Florida hotels, but McQuade, in fact, had contracts to represent these hotels outside of CATM. In none of the industry standards cases cited by ASTA, did the members of the standards bodies agree not to use unapproved products. See also Roofire Alarm Co. v. Royal Indemnity Co., 202 F.Supp. 166 (E.D. Tenn. 1962) aff'd. 313 F.2d 635 (6th Cir.), Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n, 261 F.Supp. 154 (D. Ore. 1966) aff'd. 399 F.2d 55 (9th Cir. 1968), and Eliason Corp. v. National Sanitation Foundation, 614 F.2d (6th Cir. 1980).

In each of those cases the courts found that the standards had not been adopted to foreclose a particular competition. The courts concluded that exclusion of individuals who did not meet the standards merely reflected the competitive process at work. Although exclusion from the joint venture disadvantaged the competitor, the competitor was never excluded from the marketplace. The exclusivity provisions have a different effect. Because virtually all carriers participate in the collective decision not to use other persons, other persons are actually foreclosed from the marketplace. Finally, the sports and related cases that partiesrely on simply do not address the issue of exclusivity. With two exceptions, all of the cases involved participation in sanctioned events by persons who did not meet a sanctioning body's requirements. In none of these cases did the sanctioning body preclude members from participation in unsanctioned events. Gunter Harz Sports, Inc. v. United States Tennis Ass'n, 511 F.Supp. 1103 (D. Neb. 1981) aff'd. 665 F.2d 222 (8th Cir. 1981); Hatley v. American Quarter Horse Ass'n, 552 F.2d 646 552 F.2d 646 (5th Cir. 1977) and Bridge Corp. v. American Contract Bridge League, Inc., 428 F.2d 1365 (9th Cir. 1970). The two exceptions involve the U.S. Trotting Association, an association of harness race tracks, breeders and drivers. Its rules do, in fact, contain prohibitions on member drivers and breeders participating in unsanctioned races at non-member tracks. In the earlier of the two cases, however, United States v. United States Trotting Ass'n., 1960 Trade Cases ¶69,761 (D. Ohio 1960) the court, in upholding the standards, specifically found that these rules were not being enforced. In United States Trotting Ass'n. v. Chicago Downs Ass'n., Inc., 665 F.2d 781 (7th Cir. 1981), USTA had threatened to start enforcing the prohibitions because of abuses by non-member tracks. In remanding the case to the district court the court of appeals found only that the per se rule of illegality should not apply. It found that they must be tested under a rule of reason but it did not rule that the provisions were lawful under that standard.

In order to properly evaluate these contentions, we must focus on carrier incentives. The record establishes that the incentives to continue to use the existing system are substantial. Specifically, the pronounced efficiencies of common accreditation and settlement induce carriers and agents to participate. The conference systems provide air carriers with many distribution outlets at a very low cost, because the screening, monitoring and enforcement costs are distributed among all conference participants. 186/ Carrier witnesses that testified indicated that they could not individually establish marketing systems without experiencing substantially higher costs. For that reason, Eastern's witness indicated it would remain a member of the ATC agency program if exclusivity was eliminated. 187/ Ozark's witness testified that exclusivity was not necessary to keep from not dealing with unaccredited marketers. 188/ Furthermore, ASTA's witness indicated that carriers would use all existing agents even if the conference programs themselves were disapproved. 189/ ASTA's economic witness also testified that agents might lose no more than 2% of their sales if the exclusivity provisions were disapproved. 190/

Elimination of exclusivity will merely give carriers the opportunity to use other marketing alternatives in addition to conference accredited agents if they see that to be in their best economic interests, nothing more.

Travel agents provide a unique and valuable service to air carriers: the evidence of record clearly demonstrates that their historic role of promoting the whole spectrum of travel services has fostered the growth of the air transportation industry. No one has suggested that there are marketing outlets poised to replace travel agents. Rather, all the discussions have centered around entry to persons intending to specialize in providing services to small segments of the travel industry. These would complement the existing system of travel agencies.

Commonly accredited agents will have a distinct advantage over other potential entrants because of the cost savings inherent in the common accreditation program. Given the benefits of using common agents, a carrier is not going to abandon that system until the cost savings from using common agents are outweighed by excessive commission payments. The carriers that testified indicated that there could come a time when

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186/ See pages 35-37 supra.
187/ Blake (Eastern) 47 Tr. 61-62.
188/ Wilson (Ozark) 45 Tr. 130-31 and 148-49. See also Nesbit (Continental) 48 Tr. 120.
189/ Nathan (ASTA) 72 Tr. 164.
190/ ASTA-20 at 110.

commission rates were so high that they would have to drop out of the programs.[191] But the carriers' only alternative under the present system is to open their own ticket offices. Carriers should not be forced to pursue this more costly alternative to common agents.

With our phased removal of exclusivity, the threat of entry into the marketing industry will insure that the costs of marketing air transportation are competitively set. When a new marketer can serve a portion of the travel market more cheaply, it will be able to approach carriers and afford them the opportunity to lower their costs without forcing them to give up the benefits of common accreditation. While we believe agents will continue to dominate the air transportation distribution system, that does not mean that exclusivity is unimportant in this decision. From an economic and regulatory standpoint, the possibility of entry is fundamental to competitive market performance. Potential competition--or the perception that there may be potential competition--is an important element in the free working of the marketplace.

The argument that agents will voluntarily withdraw from the ATC and IATA programs is also contrary to rational economic behavior given the incentives to participation in a common accreditation system. The ability to represent virtually all carriers as a common agent is the primary economic inducement to secure accreditation and participation. The argument assumes that the cost savings of meeting (presumably lower) individual standards will induce agents to leave the conference. An agent might generate some cost savings if, for example, it were subject to a lower bond requirement or it could employ individuals with less experience. But withdrawal from the common accreditation program would also entail substantial costs. Agents would have to undertake the cost of multiple applications and would have to satisfy multiple standards as well. If the agent attempted to deal with fewer carriers in order to reduce these costs, it would have a smaller product line over which to spread its overhead, and it would be at a competitive disadvantage vis-a-vis agents that remained in the system. The economics of common accreditation are such that it is not likely that agents will withdraw from the program entirely simply because a few carriers might offer lower standards. In short, agents and carriers have mutual incentives to participate voluntarily in the ATC and IATA programs in the absence of exclusivity.

We also reject the suggestion that without exclusivity air carriers will appoint unqualified persons. Air carriers will not return to the days of giving tickets to taxi drivers and hotel porters. Carriers recognize the potential for financial loss in appointing unqualified persons, because they are financially responsible for tickets issued in their name, including interline tickets. For these reasons, ATC's witness admitted that even without exclusivity carriers would act responsibly in selecting sales outlets. [192] Continental's witness testified that customers could distinguish between agents and other types of marketers. [193] and another witness testified that consumers would weed out incompetent marketers. [194]

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[191] See e.g., Blake (Eastern) 47 Tr. 20 and 62, Nesbit (Continental) 48 Tr. 86, and Palm (Republic) 52 Tr. 118.

Under the rule of reason, an agreement's provisions must be related to its efficiency objectives and be tailored to place no greater restraint on competition than is necessary to accomplish those objectives. With respect to exclusivity provisions, courts have rejected arguments that such provisions are necessary to induce participation in a joint venture. [195] An agreement that offers participants a significant potential for scale efficiencies they could not otherwise obtain, provides its own inducement to participants. [196] If carriers and agents believe, as we do, that the agreement yields significant efficiencies, they will participate in the common accreditation program regardless of the existence of the exclusivity provisions. If, on the other hand, carriers conclude that these efficiencies are outweighed by the costs of participation, we believe that they should be free to reach that decision without the coercive hand of the government-sanctioned restraints on their competitive behavior.

Since deregulation, we have consistently rejected the argument that carriers are incapable of acting in their own economic interest. For example, ATC at one time had argued that carrier participation in the ASP should be made mandatory and exclusive. We rejected this approach because we believed that the efficiencies of the ASP should attract its own adherents and carriers should be free to make independent business decisions about whether a program really offers the benefits promised by its creators. [197] Virtually all carriers have voluntarily chosen to participate and no harm has come to the ASP. [198] We think this evidence is indicative of the essential fallacy of the "competitive madness" arguments with which we are often confronted. In passing the ADA, Congress implicitly rejected the notion that carriers cannot be trusted to make decisions that most effectively satisfy consumer demands in a competitive marketplace. Although some carriers have made what might be regarded as bad decisions, they have paid the economic costs which is as it should be in a free economy. On the whole, however, air carriers have demonstrated that they are capable of making better decisions about how to run their businesses than could government regulators.

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[192] Buchanan (ATC) 38 Tr. 117. See also, Buchanan (ATC) 37 Tr. 39, Malin (USAir) 53 Tr. 62-64, Nesbit (Continental) 48 Tr. 121-22, Fierro Suissai for IATA) 65 Tr. 53 and TKTN-RT-2 at 17.

[193] Nesbit (Continental) 48 Tr. 161. See also ASTA 20 at 97-98.

[194] Daly (American Express) 66 Tr. 28.

[195] Associated Press v. U.S., 326 U.S. 1 (1945). We have rejected arguments that participation in a joint venture must be mandatory in order to preserve its benefits on a number of occasions. Orders 80-7-103 at 2, 81-9-83 at 5, 79-11-20 at 2.

[196] L. Sullivan, Antitrust, (1977) at 254-55.

[197] Order 79-2-91 at 3-4.

[198] Saunders (ATC) 44 Tr. 103-04.

We conclude, therefore, that the present exclusivity provisions substantially reduce competition in the air transportation marketing industry and that they are not necessary to obtain the procompetitive benefits of common accreditation. That does not, however, end our inquiry. The second step in section 412 analysis requires an examination of non-competition factors that may justify approval of the agreements. Anticompetitive agreements may nevertheless be approved if they provide important public benefits or serve transportation needs and such benefits are not attainable by materially less anticompetitive alternatives.

F. Public benefits and transportation needs.

We have concluded that most of the public benefits parties and the ALJ have cited in favor of the exclusivity provisions are really procompetitive consequences of common distribution systems. We have considered them under the Rule of Reason analysis because the reduction of distribution costs and the facilitation of information dissemination serve to increase competition between air carriers and competition within their distribution systems. We have already rejected arguments that these procompetitive effects could not be obtained if the exclusivity provisions are removed.

There are, however, three public benefits that have been alleged in support of exclusivity that we will now consider. These benefits are: (1) facilitation of interline agreements; (2) maintenance of public confidence in agents and (3) preservation of good relations with foreign nations. We treat them as public benefits because they do not strictly relate to arguments about competition in air transportation distribution.

With respect to interlining, proponents argue that current interline agreements between air carriers are dependent upon air carriers' mutual confidence in one another's agents. They maintain that air carriers are only willing to accept air transportation written by another carrier's agents and refund or exchange tickets because the conference agreements insure that accredited agents are competent. They will not have this confidence in agents appointed outside the conference programs and will curtail interlining, to the public's detriment.

There is no question that interlining is beneficial to the public. Approximately one third of all tickets that agents sell involve some interline transportation. 199/ However, we must be careful to delineate the relationship of interline agreements to the passenger agency programs before jumping to the conclusion that the existing forms of exclusivity are necessary to secure interline air transportation.

199/ ATC-D-II, ATC-T-1 at 18 and I.D. at 86, n.1. To a certain extent, interline agreements may produce efficiencies in passenger handling. Interlining is a joint activity distinct from the agency programs, and under traditional rule of reason analysis, restraints in a joint venture should be balanced against efficiencies in that joint venture, not an independent one.

At the present, travel agents write tickets by imprinting a carrier's name on blank standard ticket stock using that carrier's validation plate. Procedures for the issuance, exchange or refund of tickets are designed to facilitate settlement through the ASP. No matter how many segments of air transportation appear on the ticket, and no matter which carrier provides the service, the carrier whose plate is used or who is demoninated as the ticketing carrier is financially responsible for the entire ticket. 200/ In writing the ticket, the travel agent acts as that particular carrier's agent on the transaction. An agent can only legally make the carrier financially responsible for the ticket if the carrier has appointed that agent.

An air carrier cannot, then, force another to bear the financial loss on tickets written by a person outside the agency programs that the first carrier authorizes to sell its tickets. Rather, the proponents' benefits argument is that the second carrier will be less willing to interline with the first because the agents of the first carrier will overbook on the second flights, misticket passengers, and generally provide poor service to the public.

There is a degree of merit to this argument. Each air carrier has an interest, as does any business, in protecting its good will and reputation with the consumers it serves. In this regard, airlines will wish to avoid disruptions or inconveniences in their customers' travel plans. However, this interest does not justify the broad restraints of the present exclusivity provisions.

The agents' rights to write interline transportation are governed by interline agreements between the carriers. The agreements are distinct from the travel agent agreements. 201/ The incentive for carriers entering

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200/ If a carrier's ticket is used for connecting transportation, it guarantees payment to the transporting carriers regardless of whether it receives payment from the ticket issuer. Meredith (IATA) 62 Tr. 26-27 and 65-66; Proctor (IATA) 64 Tr. 11-12. Accounts between air carriers are settled through the Airline Clearinghouse or IATA Clearing- house. ATC-IR-4 and IATA-IR-5.

201/ ATC's conference agreement is ATC Resolution 5.65, Agreement CAB 239. It was first approved in Order #-2148, February 8, 1943. (ATC-IR-4 at 9-42). IATA's conference interline agreement is Resolution 8.50. (IATA-IR-4 at 3-19). In addition carriers can, and historically have entered into bilaterial interline agreements. E.g. Pan American World Airways and Summit Aviation, Agreement CAB 27701, approved by Order 78-12-65, December 8, 1978. After the filing of agreements was made optional, and we decided not to confer antitrust immunity on such agreements, (see Order 78-12-65 at 3 and notice regarding filing of 412 agreements in CAB Weekly List of Agreements filed 28-46 for week ending November 9, 1978), carriers have not filed their bilaterial interline agreements. See, also Buchanan (ATC) 37 Tr. 38 and Ruggerio (IATA) 62 TR. 126-29.

into interline agreements, of course, is having air transportation sold as widely as possible. 202/

We need not foreclose the possibility of new entry into the air transportation distribution industry to be certain that interlining occurs. Air carriers will interline with one another to the extent they find it to be in their economic interest. 203/ As a part of that decision, carriers will consider the quality of the prospective interline partner's marketing outlets. The use of non-accredited agents by a prospective interline partner is merely one factor to be weighed in the balance.

Potentially adverse effects on interline service were predicted in connection with our decision in the tariff flexibility rulemaking. We concluded then, as we do here, that a properly tailored transition period such as we are providing for here would allow carriers to adjust their interline agreements to a new environment without delaying introduction of opportunities for new competition in the sale of air transportation. 204/ The Board's rule has been in effect for over a year and no serious disruption of the interline system has come to our attention.

However, existing interline agreements were entered into with the exclusivity provisions of the conference programs in place. Conference carriers entering into such agreements could safely assume that persons outside the conference programs, other than the other carriers' direct sales outlets, would not be selling their air transportation. In view of our decision to eliminate exclusivity, carriers who might be concerned about the use of non-accredited outlets should be given the opportunity to revise

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202/ Under the sunset provisions of the Airline Deregulation Act, carriers' duty to provide interline service in interstate and overseas air transportation terminates on December 31, 1982. 49 U.S.C. 1551 (a). No such duty exists for foreign air transportation. See 49 U.S.C. 1374(a)(2).

203/ Even today conference carriers are not required to interline with each other and even when they do they are free to adopt bilateral agreements. Thus by the terms of IATA Res. 850j, the standard agreement will be used only when carriers desire to exchange traffic and even then carriers may mutually agree not to require execution of the standard agreement. (IATA Res. 850j, ¶2). By its terms ATC Res. 5.65 applies only where parties mutually agree to interline sales under its terms. (ATC Res. 5.65, Preamble). Access to ATC agreements is available to all scheduled carriers holding certificates, foreign permits or exemption authority from the Board.

204/ See EDR-428, July 28, 1981, Orders 81-7-108, July 28, 1981 at 12-14 (tentative order), and ER-1246, 46 FR 46787, September 22, 1981 81-9-96, September 15, 1981 (final order).

their interline agreements. 205/ However, we do not wish to unnecessarily delay the process of opening the marketing industry to the possibility of new entry.

We have, therefore, decided to disapprove exclusivity in two stages to permit new entry, while giving carriers an opportunity to revise their interline agreements. We are disapproving the exclusivity provisions immediately to the extent they preclude a carrier from contracting with persons, other than conference accredited agents, to sell its own air transportation. A carrier's interline partners have no interest in who it uses to write tickets that will only be used on its aircraft. The exclusivity provisions will continue to receive our approval until December 31, 1984 to the extent they preclude the use of nonaccredited agents to write interline transportation. We shall require that carriers are free to agree between or among themselves to honor tickets written by each other's non-accredited sales outlets for interline transportation affecting the agreeing carrier's routes. The two year period will afford carriers the opportunity to re-examine their interline agreements in light of our decision in this case. We encourage carriers to begin this process immediately and we are, of course, prepared to consider any changes that they submit for our approval. 206/

Our decision to temporarily approve the exclusivity provisions to the extent they preclude interline sales, despite their substantially anticompetitive effect, is founded on the conclusion that affording

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205/ The current conference interline agreements do not appear to address the subject. ATC Res. 5.65 contains no explicit reference to travel agents. IATA Res. 850j Attachment A defines a ticket as something issued by or on behalf of a carrier and prohibits a ticketing carrier from directly or through agents rebating the transporting carrier's tariffs. (IATA Res. 850j Attachment A, ARt. I. §21 and Art. II). It contains no explicit authorization for agent written tickets, however.

206/ Our decision to limit the extent to which the exclusivity provisions may be applied, rather than disapproving the exclusivity provisions outright and permitting the conferences the opportunity to file a modified provision tailored to our concerns, is an effort to simplify the transition period we envision. Our approach eliminates the need for the conferences to reformulate exclusivity provisions for a limited period and, we believe, fairly defines the types of arrangements carriers may enter into during the transition.

We recognize, however, that carriers may wish to formulate new exclusivity provisions with the limited applicability permitted by this decision. Should such a provision be filed, we would approve it and grant it antitrust immunity until December 31, 1984.

carriers an opportunity to reformulate their interline agreements is an important transportation need, not attainable by any materially less anticompetitive alternative.[207]

We should make it clear that the eventual elimination of the exclusivity provisions at the end of 1984 will not alter accredited agents' ability to continue to write interline tickets after that time. Nor do we expect a significant reduction in the amount of interlining in the interim. Because an air carrier is already financially responsible for its tickets, conference carriers are willing at the present time to accept interline tickets written by persons other than agents. Air carriers interline with other carriers that place their ticket stock with commercial accounts. In those instances non-accredited persons are writing interline tickets.[208] Similarly, one air carrier does not know the qualifications of the other carrier's own employees, who also freely write interline tickets. In addition, non-conference carriers and their agents write interline transportation involving conference carriers.[209]

In addition, an individual carrier that wished to sell air transportation through a non-ATC/IATA accredited agent will necessarily be concerned about and therefore guard against the incompetence of its non-accredited marketing outlets. The carrier will be financially responsible for that person's actions and would be the likely target of the ill-will that an unqualified agent might generate.[210]

Moreover, as we have noted, interline agreements may be revised to foreclose non-accredited agents from selling air transportation or from earning commissions on such sales. If the other carrier's agents continue to write interline transportation, the first carrier can discontinue its interline agreements with the appointing carrier.[211] The appointing carrier would then have to weigh the costs, along with the ill-will and other costs of doing business with a seemingly unqualified agent, against the benefits of the relationship. A carrier would have sufficient economic incentives not to deal with incompetent marketers. Finally, with the conference system in place, consumers will continue to have ready access to a system for distribution of interline tickets. Consequently, speculation about the possibility of significant harm to the interline system is so remote that it cannot be used as a basis for indefinite approval of the current exclusivity provisions.

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[207] Any immunity, of course, ceases with the end of our approval on December 31, 1984. As will be more fully considered below, automatic immunity is not triggered for other provisions of the agreements by our action with respect to the exclusivity provisions.

[208] Randal Malin (USAir) 53 Tr. 67; JRC (CO)-18; JRC (EA)-31; UA-IR-30; AA-6; and Saunders (ATC) 44 Tr. 116-17.

[209] Meredith (IATA) 62 Tr. 65-66. See also Proctor (IATA) 64 Tr. 7-8 and 10-11.

[210] See page 46, n.158, supra.

[211] That is, in fact what American threatened to do with respect to certain Air Florida outlets. Fahy (American) 2 O.A. Tr. 52. Current resolutions also prohibit a carrier from authorizing the use of its plate to write transportation on another carrier if the second carrier has denied the agency its appointment. ATC Resolution 90.3 §X.B.

The second public benefit argument that we must consider concerns public confidence in the competence of travel agents. This argument is also premised upon the notion that total exclusion of non-accredited sales outlets is required to keep unqualified persons from passing themselves off as travel agents. We have already discussed why, from a carrier's perspective, it is unlikely that unqualified persons will be appointed. From the consumer's perspective, the argument assumes that consumers will forego air travel if they have unpleasant experiences with unqualified persons. That, of course, is not what occurs today in the air transportation marketing industry or any other industry. Consumers are not now protected from incompetent travel advice. They will react as they now do to poor service by taking their business to another marketer. [212]

Given the good reputation of ATC and IATA agents, they will have an advantage over any new marketer that may enter the industry. Existing agents can differentiate themselves by highlighting their ATC and/or IATA approval. They alone will be free to identify themselves as accredited travel agents. In this regard, ATC and IATA could promote the use of identifying trade names, such as "travel agent" or "travel counsellor" with the use of a seal or trademark. There is consequently no reason to believe that consumers will not be able to differentiate ATC/IATA agents from other marketers. [213] Moreover, which outlets prosper will be determined by how well each provides its services to the public.

The third public benefit argument raised by parties involves international comity and foreign relations. IATA has argued that any significant disapproval of the IATA agency program will be interpreted by foreign governments as a denial of fair and equal access to the U.S. air transportation market and adversely affect U.S. relationships with foreign governments. It suggests that this will prompt retaliatory action.

The evidence in the record indicates that foreign governments' basic concern was that we would disapprove the entire IATA program and deny them common agents for the sale of their air transportation within the U.S.[214] However, eliminating exclusivity will not have that effect. The conference programs will continue to receive our approval. Moreover, foreign carriers and U.S. carriers will continue to have exactly the same marketing opportunities within the U.S. Any carrier can continue to rely on the conference programs, appoint other types of marketers, or use both. Eliminating exclusivity merely gives them increased freedom in marketing their services within the United States.[215] It will not be a denial of fair and equal access to U.S. markets.[216]

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[212] See Daly (American Express) 66 Tr. 28.

[213] See Nesbit (Continental) 48 Tr. 161.

[214] See Rule 14 Statements of Position of Argentina, Phillipines, and France, filed October 31, 1980, Sweden, Denmark and Norway, filed November 25, 1980, Netherlands and Pakistan filed December 10, 1980, Israel, filed January 13, 1981, and the Latin American Civil Aviation Commission filed March 3, 1981. See also Salyer (IATA) 58 Tr. 49-51 and 108.

In finding foreign relations reasons for approving exclusivity, the ALJ relied heavily on a submission from the State Department that if foreign governments perceive that our actions seriously impinge on the IATA programs, they may be inclined to take retaliatory action and it will be more difficult for the U.S. to negotiate on behalf of U.S. carriers.[217] We are sensitive to the State Department's concerns over its ability to protect U.S. interests, but this concern must be balanced against the effects on air transportation within the U.S. Unlike IATA rate agreements, which have a direct and immediate impact abroad, the conference agency programs directly affect only the distribution of airline tickets within the U.S. We have in fact accommodated the competitive considerations to foreign government interests where those interests were directly and clearly affected.[218] On the other hand, we have also refused to allow foreign governments to control or interfere with essentially domestic aviation policies.[219]

We have carefully considered the impact of eliminating exclusivity on the continuation of the IATA program and the ability of foreign carriers to market their services in the U.S. We have concluded that the impact will not be detrimental. The record indicates that non-accredited sales outlets exist outside the U.S.[220] To retain a more restrictive agency system in the U.S. because some foreign governments might disagree would give them a substantial voice in domestic aviation policy. We cannot therefore find that foreign relations considerations require approval of the exclusivity provisions merely because foreign governments may view disapproval as inimical to their interests.

Finally, there is some suggestion in the record that the entry of new marketers into the industry will divert business away from agents, forcing marginal agents out of business. It is argued that this would force a contraction of the present agency system and reduce its procompetitive benefits.

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[215] We have already rejected the argument that foreign carrier concerns are a basis for deciding aviation matters within the U.S. ER-1246 at 12, September 15, 1981 and Order 81-11-58 at 5, November 10, 1981.

[216] Fierro (IATA) 65 Tr. 25.

[217] I.D. at 98-102.

[218] IATA Show Cause Proceeding, Order 81-5-27, May 6, 1981.

[219] ER-1246 at 12 and Order 81-11-58 at 5.

[220] A number of foreign carriers use "bucket shops" or other unaccredited outlets in a number of countries. Proctor (IATA) 64 Tr. 21, Meredith (IATA) 62 Tr. 100-05, Ruggiero (IATA) 59 Tr. 169-76, and 65 Tr. 157-60. U.S. carriers are often at a disadvantage when attempting to market their services abroad. For example, US flag carriers have been denied access to reservations systems in Europe. See ATC-IR-118 at 21-30. TWA has filed a complaint with respect to such practices. See Order 82-6-114.

Carriers and the public have found that travel agents provide a valuable service and generally meet their needs for service. No one has suggested that their role will be entirely displaced by other types of marketers. Rather, the immediate interests of identifiable new entrants will most likely focus on serving discrete needs in the marketing industry that may be better served by alternate marketing systems. We have no firm basis to conclude that phased disapproval of exclusivity will result in any significant displacement of existing agents.

THE ESSENTIAL ELEMENTS OF COMMON ACCREDITATION

Our phased disapproval of the exclusivity provisions will enable ATC and IATA members to deal with and compensate persons other than those appearing on the accredited agent's list. Now we turn to the question of the reasonableness of individual provisions of the conference programs. Because this complex agreement has procompetitive effects, we will examine whether the various restraints it contains relate to its efficiency objectives. If the restrictions are not related to these objectives, then antitrust principles would dictate that the offending provisions be disapproved.

Given our decision to remove the exclusivity provisions, it may be argued that review of the individual standards of the agreements is unnecessary because any person wishing to enter the air transportation marketing industry may do so outside the conference programs.

Sound antitrust analysis, however, requires a close examination of individual provisions. If certain provisions of an agreement among competitors are related to attaining its procompetitive efficiencies but place unnecessary or undue restraints on competition, the maximum benefits of the programs and competition cannot be realized. Moreover, given the overall efficiencies of common accreditation, we cannot confidently predict that potential agents can escape the effect of unduly restrictive standards by going outside of the conferences because the cost disadvantages may be too great to be easily overcome. Because regulation has produced a system of pervasive restraints, and where the participants include virtually all competitors of consequence, we believe that close scrutiny of individual provisions is imperative.

We begin our examination of the reasonableness of accreditation standards by determining the essential elements of the common accreditation system. Our analysis addresses three questions. The first is what functions the provisions perform. The second is what types of standards are necessary in order for the conferences to function. The third is whether current ATC and IATA rules on those subjects are reasonable, i.e., are they the minimum necessary to induce carrier participation in the common accreditation program.

From the carrier perspective, the primary functions of the accreditation programs relate to the efficiencies resulting from the delegation of functions that would otherwise be duplicated by individual carriers. The conference programs eliminate duplication in information gathering on prospective agents, the review of applications to determine if they meet the standards of the programs, and the monitoring of existing agents to assure continued adherence to qualification requirements. 221/

That does not mean, however, that the standards must be such that every carrier will appoint every agent. Carriers must retain some freedom not to deal with individual outlets. That freedom is, in fact, preserved in the existing conference agreements. Carriers have only delegated to the conferences the authority to determine whether an applicant meets the conference standards. In other words, the conferences accredit agents. However, air carriers are free to instruct the conferences that specific agents cannot sell air transportation on their behalf. Individual carriers retain the discretion to appoint an agent. 222/ While appointments are withheld infrequently, a mechanism is in place for individual carriers to refuse to deal with, i.e. appoint, a particular accredited agent. 223/

221/ We have already rejected the argument that ATC's and IATA's role should be limited to collecting information on prospective agents. Some of the benefits of the programs would be lost if carriers had to assume the cost of reviewing the qualifications of individual agents and monitoring agent activities. See pages35-36, supra.

222/ The effect of such instructions is to preclude an agent from writing tickets (using that carrier's plate)--for that carrier. Interline transportation involving that carrier may still be written, but no commission will be paid. ATC-IR-72.

223/ By agreeing to blanket appointment of conference agents, carriers have in essence created a presumption of appointment. See page 22, n.63. supra. It should be recognized, however, that a newly appointed agent's ability to sell air transportation on a specific carrier's behalf is significantly curtailed if an air carrier does not provide it with a validation plate. If the agent is automated, no plate is necessary.

It is clear certain types of standards are necessary in order for ATC and IATA to perform the functions which have been delegated by the carriers. To determine what subject areas are appropriate for joint carrier decisions, we look to carrier testimony on the subject and the role of the travel agent in selling air transportation.

The testimony of the witnesses in this proceeding suggests that carriers will not participate in programs that do not consider a prospective agent's competency to ticket air transportation, its financial integrity and its record of honesty in past business dealings. 224/ Although the questions were posed in different ways, the responses were remarkably similar:

> Eastern is interested in competence, financial integrity and (ticket) security. Blake 47 Tr. 51-52.
>
> USAir wants some minimal standards of experience, knowledge and financial integrity. Malin, 53 Tr. 62.
>
> American is not concerned about rules other than those relating to professionalism and financial and being open to the public responsibility. Promotion requirements are obsolete. AA-T-1 at 6.
>
> American Express said reasonable standards relating to financial responsibility and to other business-related fitness questions. A-107 at 2-3.
>
> ASTA indicated that there was a need for financial and personnel standards. The abandonment of other standards would have positive or neutral effects. ASTA-20 at 97-98.
>
> DOJ said there should be minimum standards to prevent fraud and insure financial integrity. Guerin-Calvert 83 Tr. 146-47.
>
> NPTA stated standards relating to knowledge, background, experience and financial responsibility are permissible. Prairie 22 Tr. 122-23.

It is unlikely, therefore, that carriers would be willing to delegate to the conferences the authority to appoint persons as their agents in the absence of standards in these areas.

An examination of travel agents' roles in selling air transportation also supports standards in these areas. IATA identified expressly four functions that a travel agent performs--information provider, service provider (ticket issuer), trustee of funds collected on carriers' behalf,

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224/ The security of traffic documents was also a common concern. We will consider that question as part of the ASP.

and traffic generator. [225] As information provider and ticket writer, an agent can bind a carrier to contract under terms that carrier never intended by providing incomplete or simply erroneous information. For example, the carrier can be bound to provide service at less than its established price or the carrier may find itself liable for lost or damaged baggage or failure to provide transportation in amounts which exceed those established by the carrier in setting its ticket prices. In addition, the ill-will generated by errors in this area may reduce the traffic generation benefits of the agent. For that reason, it is reasonable to conclude that some form of competency standards are necessary.

As a trustee of carriers' funds, the agent exposes carriers to risk of loss, if through dishonesty or lack of financial stability, funds collected by agents are not forwarded to the carrier. It is reasonable to assume that carriers acting individually would adopt standards to protect themselves against these risks and that they would not participate in a common accreditation program which did not provide such protection.

The agents' role as traffic generator raises more complex issues. To the extent that the mere presence of a large network of marketing outlets generates traffic, this would seem to be a legitimate objective of the conference programs. This concept of promotion includes the notion that whenever a person provides to the public information on fares and services he is facilitating the purchase of air transportation and, thereby, promoting it. Indeed, as noted above, the existence of established distribution systems in new markets probably enhances actual and potential competition.

Historically, however, promotion has meant the inducement of sales that would not otherwise be made. In the early days of the air transportation industry agents were given the role of trying to convince vacationers to fly, rather than travel by rail or bus, while the airlines served the portion of market that had to fly through their direct outlets. [226]

Standards based on this concept of promotion stand on less secure footing than those on the more limited concept. The concept is really very vague. If the concept is that promoting involves additional tasks, other than simple ticketing, it is clear that much of travel agents' current business is non-promotional. In-plants and travel agencies that focus on corporate business do not promote air transportation in the historic sense. In these instances, they are being compensated for providing ticketing and reservations services. [227] In fact, simple sales seldom involve promotion.

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[225] IATA Brief to the Board at 46.

[226] See Buchanan (ATC) 37 Tr. 29. See also Order 70-12-165 at 27.

[227] Gellman (ATC) 34 Tr. 76-77; Buchanan (ATC) 36 Tr. 88; Blake (Eastern) 47 Tr. 35; Saunders (ATC) 49 Tr.76-77.

While we will discuss the application of the promotional requirements to individual provisions, it seems clear that the conferences should, during the transition period we have provided, attempt to clarify their promotional requirements. They should carefully define the nature of the promotion they will require, cognizant of the fact that many travel agents do not promote to any significant degree (in the historic sense) and that conference standards cannot arbitrarily exclude persons from their programs.

Having identified integrity, competence and financial stability as appropriate subjects for standards, we must still determine whether the particular standards are more onerous than necessary to attain air carrier confidence in conference approved agents.

No party at this stage of the proceeding seriously opposed the existing financial requirements, 228/ and we find that they do not unduly restrict competition.

Both the ATC bond requirement and the IATA capitalization provision appear reasonably tailored to carriers' legitimate interest in the financial stability of their agents. IATA's capitalization requirement is evidently premised on the view that an agent will be better prepared to conduct a business if the applicant has a significant amount of its own capital at risk in the venture. ATC, on the other hand, apparently believes the preferable approach is to require the posting of a bond to protect members from loss at the hands of the agent.

Neither requirement has been shown to have a significant adverse effect on competition. Few applications are ultimately rejected on financial grounds. 229/ The cost of obtaining a $10,000 bond is approximately $79 for a person with a good credit standing and the cost of the average bond was about $200. 230/ Similarly, the IATA minimum capitalization requirement does not appear to impose an undue burden on prospective applicants. Determination of a mutually acceptable capitalization level is, in large measure, a matter of judgment. No one has complained that it is unreasonably high and the amounts required seem to be less than most persons would have on hand if they were beginning a business. 231/

228/ The text of the financial standards is set out in Appendix E. The Fifth Circuit Court of Appeals in E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee, 467 F.2d 178, 188 (5th Cir. 1972), upheld the imposition of integrity and responsibility standards as a condition to the participation in a joint venture. At one time DOJ and NPTA urged disapproval of all common accreditation standards, on the grounds that any such standards would impede individual carrier flexibility in appointing agents. DOJ has abandoned its position and does not now challenge the financial standards. Although NPTA's current position with respect to these standards is unclear, we find, in any event, that some financial standards are necessary to accomplish the efficiencies of common accreditation.

229/ ATC indicates that only 40 applications were rejected in 1979 because of the absence of a bond. ATC Brief to the Board at 2.

230/ ASTA-20 at 54. I.D. Appendix C, Table 9.

231/ Knodt (ASTA) 68 Tr. 77-78.

Moreover, both standards are objective and easily administered. With the bonding requirement the bonding company will actually evaluate the agent's financial status, rather than ATC. Thus there is little risk that the standard will not be fairly administered. [232] Nor does the IATA rule lend itself to arbitrary application. Both the working capital and stockholder's equity rule are straightfoward and easily verifiable.

ATC wishes to impose an additional financial standard on persons who would enter their travel agency program. They have filed with us for our approval, and we have consolidated into this proceeding, an agreement which would require individuals connected with travel agency applicants and certain authorized agencies to guarantee personally the performance obligations of the agency arising under the ATC Sales Agency Agreement. [233]

Since the time of original filing, ATC has indicated its willingness to limit the circumstances in which the guarantee could be involved. It has made it clear that it would not enforce the guarantee until the ATC agency bond has been exhausted and that the guarantee would only apply to sales of the type covered by its bond. [234]

During the course of the proceeding, ATC indicated its intention to modify the agreement further. ATC would no longer require the personal guarantee from all applicants. Rather, it would apply it only to an agent which has defaulted or where the Travel Agent Commissioner so orders. In addition, limited partners would no longer be required to provide a personal guarantee. ATC also indicated it would apply the personal guarantee to incorporated agencies owned by a corporation. The shareholders of the parent corporation would be required to provide a personal guarantee as if they held the stock of the agency directly. [235]

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[232] See *ATC Agency Resolution Investigation*, 29 CAB at 267. The Board required fair and objective review procedures and elimination of the need and sponsorship provisions to assure that the agency resolutions were not used to protect carriers and existing agents from new agent competition. See also Order 72-4-114, April 20, 1972, in which the Board disapproved substitution of a complex financing standard for the bond. Over the course of time, the conferences have adopted a variety of measures to assure fair application of their rules. At the present time both conferences provide for review of disapproved applicants by an independent travel agent commissioner with a right of appeal to binding arbitration. The ATC provisions (currently set forth in Res. 80.4) were originally approved on a trial basis in Order 75-6-49, June 10, 1975, and subsequently approved in Order 79-11-21, November 1, 1979. IATA's program (IATA Resolution 802d and 802) was approved on an interim basis by Order 80-7-112, July 17, 1980, with the rest of the current program.

[233] The text of the proposed agreement appears in Appendix E. By Order 79-11-196, November 28, 1979, we conditionally approved the agreement. On reconsideration, however, we withdrew our approval pending a review of its ramifications in this proceeding. Order 80-8-64, August 12, 1980.

[234] Order 80-8-64 at 3.

Judge Yoder recommended that we approve the personal guarantee with the changes proposed by ATC. No party objects to the agreement as modified.

We will adopt the Judge's recommendations. While ATC has not justified imposition of the personal guarantee on all applicants, as ATC originally proposed, its latest formulation will only apply to situations involving unusual risk of loss to air carriers. Applying the bond to all applicants is not required because, as the ALJ found, losses in excess of bond have stabilized in recent years at less than $1 million. [236] These losses represent a small portion of total agent sales, potentially less than 0.1 percent. [237]

However, we are concerned that the provision not be applied in a way that unnecessarily restricts travel agent resources. Although the personal guarantee would not, in a legal sense, create a lien on personal assets of the agency's owners, it could be perceived as an encumbrance by lenders and thus make it more difficult to obtain financing. ATC should attempt to clarify that its proposal does not create a security interest in an agent's assets.

In addition to finances, ATC and IATA examine a prospective agent's background to determine if it may attempt to defraud carriers or the public. They preclude accreditation if there is a false statement in an application, the applicant is a convicted felon (ATC only) or has been found guilty of willful violations of fiduciary obligations to the public or to airlines (IATA), has been adjudicated bankrupt (ATC only) or has had a previous license suspended, unless the Administrator determines, after investigation, that the applicant can be relied upon to adhere to the terms of the agreement. [238]

No party opposes the honesty provisions at the present time and the ALJ concluded that they should be approved. The purpose of the honesty provisions is to assure that agents carry out their role as trustee of blank ticket stock, carrier plates and funds they collect from consumers. No carrier could reasonably be expected to entrust ticket stock and money to a person whose integrity is doubted. The existing provisions appear to be reasonably tailored to meet this end. The provisions refer to specific circumstances which might reasonably lead one to question the integrity of an applicant.

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[235] See ATC Reply Brief to ALJ at 60.

[236] I.D. at 134-135. In comparison, losses from tickets by mail were over $14 million. ASTA-10 at 7-8.

[237] Id. Precise comparisons are difficult to make because exhibits on the subject generally compare both domestic and international losses.

[238] The text of the agreement appears in attached Appendix E.

With respect to competency, the ATC and IATA rules focus upon whether there are persons employed at an agency with managerial and ticketing experience. 239/ In contrast to the financial and honesty standards, there is some opposition to the provisions designed to insure the competency of accredited agents. American Express and NPTA challenge aspects of the manager qualification requirements and DOJ challenges aspects of the ticketing experience provision.

American Express does not oppose the content of the managerial standards, but the application of those standards to branch offices. In American Express' view, multiple location agencies should be allowed to determine the qualifications of their own branch office managers. Because the managers' duties are usually administrative and the actual ticketing and counseling is done by others, American Express maintains there is no necessary correlation to agency competence.

American Express recognizes, however, that reasonable standards relating to business needs are justifiable. 240/ The different aspects of the conference standards for qualifying managers all have been related to business needs. The reason to require the manager of the location to exercise daily supervision and responsibility while the agency is open is apparent. The manager is responsible for insuring that the location functions smoothly, handling complex problems, dealing with customer complaints and so forth. It is also reasonable to require that the manager be familiar with the travel industry and, in addition, with the basic procedures involved in operating an agency by demonstrating familiarity with the Travel Agent's Handbook. Admittedly, the standards do not insure that persons using an agency location will always be properly ticketed. But, perfection is seldom obtained in any endeavor. The standards reflect a reasonable effort to insure that each agency has a person on the premises competent to handle most travel problems and available to address them. American Express does not oppose these rules when applied to individual agency locations. Rather, it seeks a special rule for its special situation. By their very nature, standards in joint ventures must limit the options of participants. The fact that they are not optimally suited to an individual participant's mode of doing business does not without more make them unreasonable under the antitrust laws.241/

We nevertheless recognize that there is a measure of validity to American Express' arguments. Since home office locations are financially responsible for losses caused by their branches, 242/ there would seem to be a lesser need to impose a managerial standard on such locations. Home office liability protects the carrier and provides incentives to the agent to insure branch manager competence.

239/ The text of the ATC and IATA resolutions appears in Appendix E.

240/ Am Ex-107 at 3. DOJ states that carriers have a legitimate interest in agent competence. DOJ Brief to Board at 44.

241/ We reject NPTA's objection that the managerial standards might be used to deny persons who have worked in business travel departments from being managers for the same reason.

242/ ATC Resolution 90.3 §IV.D.4. and IATA Resolution 802 §C(13).

There is also merit to DOJ's arguments with respect to ticketing experience requirements which it challenges on the grounds that some types of experience are unreasonably excluded from consideration as credit toward the experience requirement. Specifically, experience obtained in corporate travel could not be considered, no matter how long a person worked there.

DOJ has suggested a significant weakness in the ticketing experience requirements. Both conferences, but especially ATC, look to where experience was earned, rather than attempting to formulate standards based on the actual ticketing ability of the applicant. DOJ contends that a preferable approach would be to test an individual for basic ticketing skills. Such a program would be far more objective. In fact, ATC once adopted a testing program. It was never implemented, however.[243]

In addition, we are concerned because both ATC and IATA apparently require that the managerial or counseling experience include promotion of transportation services, in the historic sense of generating additional traffic.[244] As we have already noted, many travel agents generate little or no travel. For that reason, a standard based upon this concept appears somewhat arbitrary and, therefore, suspect.

We will not, however, require ATC and IATA to modify their rules. Rather, we will leave any changes to the resolutions to the conferences themselves. They may wish to reconsider their management and ticketing experience requirements as well as some of their other standards during the transition period we are providing for the travel agency agreements.

No one challenges any other aspects of the competency standards and we find that none of them unreasonably restricts competition. While the standards may be higher than those that would have arisen in a competitive market, after the end of antitrust immunity for the conference programs in two years, we would expect that standards will adjust to the demands of a competitive system. With respect to specific standards, the requirement that the travel agent demonstrate knowledge of the handbook insures that the agency will be operated in accordance with conference rules. In addition, the handbooks contain technical information on operating practices. Likewise, the general requirement that the manager be present to exercise daily supervision over the agency when it is open for business helps ensure that the location is operating properly. Moreover, it appears that this provision is being administered with some degree of flexibility.

243/ Approved by Order 75-6-41, June, 9, 1975. The program was apparently dropped because of significant travel agent opposition. See ATC-T-1 at 52 and ATC-T-2 at 33, 34. See also ATC IR-74 at 15-278. A testing program need not supplant an experience requirement, but could be offered as an alternative means to establish ticketing competence.

244/ ATC defines travel counselor in its restrictions. The definition requires that the person have dealt with the public in the promotion or sale of general travel services. It is apparently interpreted to require experience to generating new sales. *See* Jauneters 40 Tr. 68-69 at 33. While ATA does not define travel counselor, it apparently interprets the term in the same way. Ruggiero (IATA) 61 Tr. 84-89.

IATA and ATC have also identified a category of rules they label as location standards. A number of provisions have been placed in this category. The basic location requirement is that travel agents operate only from approved locations.[245] These standards apply to both home office locations and any branch offices an agency may wish to open,[246] except for ATC in-plant locations. ATC and IATA review the suitability of the premises on which an applicant proposes to operate. Toward this end, ATC's provisions require that photographs of a proposed location must accompany an agency application.[247] Frequently, the premises will be visited by an inspector to determine whether the proposed location is acceptable.[248] Since very few applications are disapproved on the basis of unacceptable locations, it appears that the rules are liberally applied.

As a practical matter these requirements require the agency location to be in operation before the application is filed. Parties argue that the purpose of the basic location standard would be frustrated if applicants could rely on planned locations where the plans might never come to fruition. This requirement does not appear to cause prospective agents significant hardship. Both conferences permit applicants to sell air transportation while an application is pending and both provide for compensation on such sales regardless of whether the application is eventually approved.[249] In addition both conferences attempt to process applications in 60 days or less. [250]

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[245] ATC Resolution 90.3 §I and IATA Resolution 802 §A(2).

[246] As of December 31, 1979 there were 11,144 independent ATC accredited travel agent offices, 1,636 home offices and 3,332 branches. ATC-IR-931 at ii.

[247] ATC Resolution 90.3 §V.B.4.

[248] Buchanan (ATC) 37 Tr. 115 and IATA Resolution 802 §D(2)(e). Between October 1978 and October 1979 only 5 applications to ATC were disapproved on the grounds that they failed to meet the location requirements. ATC-IR-14 at 1-12.

[249] At the present time commissions are paid retroactively, after a decision on the application has been reached. See e.g. ATC-T-2 at 5. However, during the course of the hearing witnesses testified that the payment of commissions to applicants periodically pending decision would not add significant administrative burdens for carriers. See Fierro (Swissair for IATA) 65 Tr. 47-49, Meinkoch American 56 Tr. 41, 42. and 58 Tr. 119. As a result of that testimony, both ATC and IATA have indicated their intention of filing amendments to their resolutions providing for periodic payment. I.D. at 146-47. Judge Yoder concluded that the provisions should be approved subject to the adoption of the indicated amendments. We do not believe a specific condition requiring the change is necessary. ATC has in fact filed such an amendment. This agreement, Agreement CAB 28217-12, was approved by Order 82-2-10, February 3, 1982. With respect to IATA, we prefer that air carriers themselves make changes to their resolutions, given our decision to eliminate exclusivity and withdraw antitrust immunity on December 31, 1984. Of course, if such amendments are filed, they would be approved.

We believe the requirement that accredited agents operate only from locations that appear on the accredited agents list can be tied to the objective of insuring the security of valuable traffic documents. Absent such a requirement, it would be far more difficult to monitor agent use of such documents, to head off fraudulent activities, and to take enforcement action when it appears necessary. [251] As a result, the basic location requirement stands on the same footing as the financial requirements.

The specific requirement that locations conform to security regulations, which is also sometimes referred to as location requirements, also appears to be reasonable. The regulations themselves are specific and objective and no party has suggested that they impose an undue burden on agents. Under the resolutions, compliance provides agents with a direct benefit. In the event tickets are lost or stolen, in certain circumstances, agents may be relieved of liability to carriers for lost and stolen tickets which the carriers honor. Moreover, none of these standards have been challenged by any party.

However, DOJ objects to two other aspects of the location requirements. First, it argues that the requirement that a location be freely accessible to the public may keep out firms that may find they can effectively meet consumer demands by operating by telephone or by specializing in sales to particular groups or engaged solely in ticketing services. [252]

The requirement that locations are freely accessible to the public for the promotion and sale of air transportation is justified on the grounds that it is necessary to encourage the promotion of passenger air transportation. [253]

DOJ and ATC basically repeat their respective arguments in opposition to and support of the ATC rule that provides that an agency must be open for business no less than 35 hours a week, [254] and the IATA rule that requires that an agency adhere to a regular schedule in accordance with local business practices. 255/

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[250] The text of the location provisions appears in Appendix E.
[251] An ATC witness implied this in his discussion of the ATC requirement that an agency be open at the time of its application. See Buchanan (ATC) 38 Tr. 44-49, 54.
[252] DOJ Brief at 45.
[253] ATC Reply Brief to the Board at 45, citing Buchanan (ATC) 37 Tr. 85-85, 181-82.
[254] ATC Resolution 90.3 §IV.A.4.

Insofar as these provisions are based on notions that only persons who generate air transportation sales should be accredited, they would appear to go further than is necessary to accomplish legitimate objectives of the programs. As we have already indicated, no one has been able to quantify an amount of new sales that each agency should generate. That fact does not, however, in our view justify disapproval of these provisions as unreasonable restraints on competition. These provisions also relate to the legitimate goal of increasing public access to distribution services. While they could be refined to more carefully accomplish that purpose, and perhaps be eliminated, we prefer that air carriers themselves decide whether to make such changes. 256/

This completes our review of provisions falling within general categories of permissible standards. We have not examined the provisions that parties have argued fall into these categories in detail but have dealt with those that clearly fall within or outside the legitimate objectives of the programs. Generally, these provisions do not appear on their face, or as construed by the conferences, to unnecessarily restrict competition and we will approve them. Having identified goals that would be recognized by the antitrust courts, and potential problem areas in the agreements, participants in the conferences should have no difficulty in reaching conclusions on the types of standards that will withstand scrutiny under the antitrust laws. We will now deal with individual restraints within the programs that parties have challenged as unreasonable invasions into the ways carriers and agents may do business.

REQUESTED MODIFICATIONS OF THE PROGRAMS

A. BTD Restrictions

Many corporations assign specific personnel to arrange travel plans on behalf of their employees, frequently on a full-time basis. These corporate travel departments or business travel departments (BTD's) will perform many of the same functions as a travel agency, such as calculating the best fare and service options, making reservations, writing tickets, and arranging hotel accommodations and car rentals. As we have already noted, many of them use the same automated equipment that might be

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255/ IATA Resolution 802 §C(5).

256/ We should note that one court has struck down similar restrictions between horizontal competitors. *U.S. v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980).

found in a travel agency. [257] Both the ATC and IATA rules contain provisions that prevent such offices from attaining agency status. It is the combined effect of two provisions that actually accomplishes this result. The first of these is the 20% rule which prohibits anyone doing 20% or more of his business with himself from becoming an agent. BTD's, which would write tickets almost exclusively for their corporate owners, cannot, then, become agents. [258]

The 20% rule is complemented by another provision, the common control rule. It precludes conference members from paying commissions on air transportation sold to any person who has a financial interest in the agent, any owner, partner, officer or employee of the agent, and any owner, partner, officer or employee of any entity which owns, controls or has a financial interest in the agent. [259] As a result of the "common control" rules, an owner of any agency, whether it be a corporation or another person, is precluded from taking a commission on a ticket his agency writes for his own use. Commissions on such sales are prohibited even though the agent will have performed all the services for which commissions are normally paid and the airline will receive the benefit of those services.

DOJ and NPTA make general arguments that such anti-BTD restrictions should be disapproved as anticompetitive. In their view, BTDs are the functional equivalent of travel agents. Some corporate customers prefer using the services of BTD's rather than travel agents and some carriers might, if given the choice use them. American Express challenges the common control provisions, but not the 20% rules.

ATC and IATA, as well as most of the travel agent parties, argued, and Judge Yoder agreed, that BTDs are really purchasers of air transportation and cannot be considered agents within the meaning of the term as used in the conference programs. Moreover, it is argued that corporations already have the means to reduce their travel costs. Parties cite our decision in the Tariff Flexibility Rulemaking, ER-1246, 46 FR 46787, September 22, 1981. In that proceeding we concluded that air carriers could negotiate with individual purchasers on the prices they would charge for domestic air transportation and that such fares need not be filed with us in carriers' tariffs. Parties argue that, as a result of that proceeding, corporate purchasers, including those with BTD's, are free to attempt to persuade air carriers to grant them discounts on the basis of the volume of air transportation they purchase or the ticketing and reservations services BTD's perform. The fact that few discounts are currently offered only reflects the airlines' conclusion that such discounts are uneconomic. These parties argue further that airlines should not be forced to grant corporations discounts by making BTD's accredited agents.

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[257] Unlike travel agents, however, they will use the ticket stock of individual carriers in writing tickets, rather than the blank standard stock that agents use. BTD's settle accounts with air carriers directly, rather than through the ASP. The terms of settlement are individually negotiated with air carriers. Generally, BTD's report sales twice monthly. Because of the use of the Universal Air Travel Plan, which is essentially a credit card for frequent travelers, payment for transportation issued by BTD's occurs as much as 60 to 90 days after tickets are prepared. Nelson (Eastern) 47 Tr. 105-106.

[258] The rule does not preclude an agency from doing more than 20% of its business with one person. Travel agencies located on customer premises clearly do more than 20% of their business with one person. Rather, the restriction is aimed at writing tickets for one's own use, as a BTD does for its corporate owner. ATC Resolution 90.3 §IV.A; IATA Resolution 802 §C(5).

[259] The rules provide an exception for sales to employees for their personal use. ATC Resolution 90.3 §XXIC.8, IATA Resolution 802 §6(7)(8).

Our decision on whether the BTD provisions should be approved is complicated somewhat by our actions with respect to exclusivity. Viewing the record in this case, it appears that these provisions, coupled with exclusivity, have operated in the past to unreasonably restrain competition. However, we at the same time do not want to force carriers to compensate BTD's as agents when individual carriers may be unwilling to provide discounts directly to corporate purchasers.

We have therefore decided to grant approval to the present BTD restrictions until December 31, 1984. During this period, we expect that the marketplace will adjust to the new freedoms afforded by elimination of exclusivity. It is entirely likely that common standards specifically designed to define the marketing role of accredited agents would not be found to be anticompetitive after this period of transition. There are some suggestions that the present rules are overly broad to accomplish legitimate marketing objectives and carriers may wish to reconsider the specific formulation of standards in this area.[260] Carriers will have an opportunity to evaluate these restrictions in light of the objections that have been raised and changes that will occur over time in the marketplace.

Our legal framework for the analysis of the BTD restrictions is essentially the same as our discussion of exclusivity. [261] The agreements constitute a concerted refusal to deal with a certain class of persons. Because the excluded class is on a different level in the chain of distribution and not directed at competing air carriers, it should not be treated as a classic group boycott. Under a rule of reason analysis, the purpose and effect of the rule must be examined. If excluded persons have other avenues available to them in the marketplace, exclusion from one sourse of supply may not have a significant adverse effect on competition.[262]

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[260] See Wilson (OZ) 45 Tr. 163-164, Nesbitt (Co) 48 Tr. 105-106. See also Wilson (OZ) 45 Tr. 135 and Bessel (ASTA) 69 Tr. 52-55 on the similarities of BTD's and in-plants.

[261] Where a court finds that an agreement produces procompetitive efficiences, individual restraints must be necessary to obtain them and not place a greater restraint on competitors than necessary to achieve those benefits. See, pages 27, 38 and 41-42, supra.

ATC and a number of other parties maintain that BTDs are not really agents, but purchasing departments for their corporations, and that elimination of the rule will force them to deal with purchasers as agents. They cite principles of common law to the effect that agents cannot deal for their own account. We need not dwell on common law principles of agency for, even then, agents could deal for their own account with the permission of their principal.

An individual decision not to deal with a purchaser on the particular terms it demands is clearly permissible under the antitrust laws. If an individual carrier believed the payment of commissions to persons who wrote tickets predominantly for their own use was uneconomic, it could therefore refuse to pay such commissions. However, because an agreement among virtually all major airlines operating in the U.S. not to deal with such persons precludes their entry into travel agency marketing, it is suspect under antitrust standards.

The common control rules involve a joint carrier decision not to compensate some types of sales. For that reason, we disapproved other carrier agreements fixing the compensation they would pay agents, including provisions prohibiting commissions on other types of sales.[263]

The provisions were historically justified on the public interest ground that it was necessary in order to prevent illegal rebating. At one time, a fare that was not contained in a tariff was an unlawful rebate. In domestic air transportation, we have substantially curtailed air carrier tariff filing obligations[264] and it will be eliminated by statute in less than a month.

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[262] See pages 47-48, supra. As in the case of exclusivity, court decisions that upheld application of standards to deny access or exclusive arrangements are not on point. In those cases the restraint was either found necessary to the cooperative venture, *e.g.*, *Deeson v. PGA*, 358 F.2d 165 (9th Cir. 1966), or competitive alternatives were readily available. *e.g.*, *Oreck v. Whirlpool*, 579 F.2d 126 (2nd Cir. 1978).

The restraint is not necessary to maintain the economies of the programs after the transition period. The cost of accrediting and administering an additional agent is not so great that doing so for BTD's will substantially increase the administrative cost of the program. Nor would eliminating the rule necessarily cause carriers to withdraw. *See* testimony of witnesses cited at n. 260, *supra*.

[263] Orders 78-8-87, August 17, 1978 and 80-2-33, February 5, 1980. See *U.S. v. Socony Vacuum*, 310 U.S. 190 (1980) (any restraint tending to stabilize prices is unlawful). *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (agreement fixing credit terms held unlawful despite absence of agreement on price itself.).

[264] ER-1246, 46 F.R. 46787, September 22, 1981.

With deregulation, we recognized that carriers should be free to charge passengers in relation to the costs of the individual transaction. 265/ Under this policy, carriers could compensate persons who provide ticketing and reservations services or any other cost that air carriers would normally bear, even if the transportation is used for their own purposes.

The IATA rule on sales to affiliated persons has been justified as a means for carriers to insure that persons do not receive a lower fare because of commission payments on travel they purchase. In other contexts, we concluded that even as to international air transportation, compensation of persons for the services they perform really falls outside of the conduct section 403 was intended to prohibit. We decided that cargo shippers could be compensated for preparing their cargo to be shipped and that the net price actually charged them for shipment need not be stated in tariffs on file with us. 266/ Moreover, we have permitted carriers to provide free and reduced rate transportation to agents without filing special tariffs and to provide free and reduced rate transportation to any customer in exchange for goods or services. 267/ Under our current policies and rules, payment of commissions on affiliated sales are not rebates nor would carriers be required to file a special tariff rule to implement them.

Parties also argue that there are other avenues open to corporations, specifically the opportunity to obtain direct discounts. This observation alone is not sufficient to find on the basis of the record that the BTD restrictions are not anticompetitive.

As currently applied, even companies like American Express, which no one has suggested is not a legitimate travel agent, cannot make a profit on sales to itself. Profits on self-dealing are accepted as a legal and economic matter in all facets of commerce. 268/ No compelling case has been made for permitting a group of competitors to combine to preclude such profits for an indefinite period in this industry.

We are also concerned that the 20% rules exclude certain persons who may wish to become accredited agents and comply with all other standards governing travel agencies. Although most corporations probably do not wish to be come agents, others may see air transportation marketing as a profit making opportunity.

265/ See 14 C.F.R. 399.36, PS-93, 45 FR 36062, May 29, 1980.
266/ 14 CFR 399.86, PS-86, 44 FR 45609, August 3, 1979.
267/ 14 CFR 223, ER-1181, 45 FR 46801, July 11, 1980.
268/ In unregulated industries, a firm may establish or acquire a company with the view toward reducing costs through the integration of functions. There is no prohibition on earning a profit from sales to the parent company.

A company which is a heavy user of air transportation but which wants to enter the travel agency business and generally deal with the public is prohibited from doing so and, at the same time, using its own agency's services.[269]

Because of the industry-wide nature of the agreements, large users of transportation are thus inhibited from becoming agents. To some extent, the collective decision on these standards relate less to the function that a travel agent performs and more to the ownership of the agency. In many respects, the functions performed by BTD's are comparable to those performed by in-plants. In-plants are currently exempted from ATC's personnel requirements as well as the requirement that they be open to the public. Thus, in-plants could be staffed by the same people that staff a BTD. As a result of the Board's decision in the Transmark case, in-plants are free to reimburse customers for shared employees and most in-plants do so. Agents have set up in-plant agencies by taking over activities of BTD's using the customer's BTD employees. In addition many in-plants, like BTD's, are limited to providing services for official travel only and do not service pleasure travel needs of their employees.[270] BTD's like in-plant agents, arrange intineraries, arrange hotel accommodations and provide ticket reissuance and related services. The only practical difference is that a customer owns the BTD, but cannot own the in-plant. The carrier agreements in this area therefore appear to restrain entry unreasonably, given the practices that are now an accepted part of the agency program.

Some parties have argued that the BTD restrictions are necessary to maintain the competitive benefits of common accreditation. This argument rests on the assumption that if BTD's can get commissions, the loss of sales to agents will be so great that large numbers of agents will be forced out of business. If this happens the agency network will shrink substantially reducing the consumer carrier benefits that are associated with the existing system.

We do not believe that any dislocation will lead to such a substantial reduction of the agency network. Obtaining accreditation will not be without costs to the BTD. It will have to obtain personnel to meet ATC's standards as well as providing a bond and meeting ticket security requirements. Moreover, they will lose the benefits of generous credit terms as they go to weekly reporting under the ASP. For many corporate users of transportation these costs may outweigh the benefits.[271]

269/ The 20% rule could be applied to foreclose entry completely if the agency wishes to do more than 20% of its business with itself. The common control rule will prevent it from earning revenues on sales to itself, even if the sales amounted to less than 20% of its own business.

270/ Bessel (ASTA) 69 Tr. 52.

271/ Under existing settlement rules, BTDs would have to remit payment on tickets they write eight days after the end of the weekly sales cycle. BTDs, at the present time, generally have a much longer period before payment is due. BTDs would, then, loss the "credit float" they now have if they became agents, NPTA-R-1 at 3. See also, Nelson (Eastern) 47 Tr. 105-106.

In 1978 only 18% of travel agents that handled corporate accounts dealt exclusively with large corporations. The remainder dealt with medium and small corporations or combinations of all three. 272/ Moreover the larger agencies tended to deal more predominantly with larger clients. 273/ Given the costs of becoming accredited, accreditation is likely to be more attractive to only the larger users of air transportation. But these customers would be dealing with the larger travel agents who are best equipped to offer attractive alternatives to BTD's contemplating accreditation.

Predictions in the record on revenue shifts if BTD's are accredited also suggest that no great contraction will result. ASTA estimated that BTD-handled sales would increase by $250 million over what they handled without being accredited out of total sales of $18.6 billion (based on 1979 sales figures) or 1.3 percent. 274/ Assuming that agents had only 50 percent of domestic sales and that all the transfer came from sales previously made by agents, this would result in a loss of at most two percent of agency sales. 275/

While we find that the operation of the present BTD provisions may unnecessarily exclude some persons who wish to distribute air transportation, elimination of these provisions at this time could unnecessarily distort the functioning of the agency programs. Alternative means for BTD compensation that are not now available could evolve as a consequence of our decision to eliminate exclusivity and our relatively recent determination that corporations may receive discounts.

To the extent that BTD's are only seeking price concessions to reflect the value of their ticketing services, these are permitted under existing policies. 276/ Whether or not they are granted is a matter to be resolved between air carriers and individual purchasers. In addition, the phased removal of exclusivity will allow BTD's to attempt to persuade airlines to compensate them for their services outside of the accredited travel agent system.

If we were to remove the BTD restrictions immediately, large numbers of persons who have not obtained direct price concessions in the past

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272/ ATC-T-17 at 6.

273/ Id.

274/ ASTA-20 at 111. See also NPTA-T-1 at 24.

275/ These assumptions are more favorable to the argument than is probably really the case. To the extent that agents have a larger share of domestic sales and hence a larger dollar total, the $250 million will be a smaller percentage of the sales. In addition, we cannot predict that all of the BTD's increased sales would be at the expense of agents. Some could be at the expense of airline sales though ticket offices or tickets by mail.

276/ *See* pages 79-80, *supra*.

because of our regulatory policies, could attempt to gain agency status regardless of their interest in operating retail sales outlets. The real interest of many corporations and other larger purchasers of air transportation is to obtain volume discounts or other direct price concessions because of the special cost characteristics of their dealings with airlines. But for our fare policies they might have obtained such discounts directly and would not now be attempting to force air carriers to grant them by seeking changes in the agency programs. With our adoption of a new policy statement on discrimination and the tariff flexibility rule we have eliminated obstacles to direct price concessions. However, those changes occured recently and the market place has not had time to respond. Moreover, BTD's as agents would have no guarantee that they would actually obtain commissions. Air carriers could still individually decide not to compensate persons who deal primarily on their own account. There are already mechanisms within the ATC and IATA programs that allow a carrier to refuse to appoint an approved agency. [277]

We prefer to give the marketplace a chance to work to correct these potential distortions. This approach will preclude the entry of persons that do not really want to become agents. Consequently, we find that the ATC and IATA 20% rules and common control rules should be approved until December 31, 1984 because they are necessary to insure a smooth transition to the deregulated environment. We find that a transition period will serve public benefits that justify approval of provisions that might now be regarded as anticompetitive. The future legality of the BTD restrictions, in large measure, turns upon the existence of alternative trading opportunities. If there are alternate means to accomplish the same objectives, exclusion from dealing with parties to the agreement does not substantially reduce competition. Their effect on competition will depend on the structure of the marketplace at that time. Carriers may find that our approval and antitrust immunity are not required and they may choose to continue this type of restriction.

Because the rules now seem overly broad, carriers may in the interim wish to explore less anticompetitive means to accomplish their purposes. For example, carriers could collect information on the amount of self-dealing an applicant would do. Individual carriers could then decide whether or not to deal with that agent. A carrier could also choose to pay a given agency a different commission level than other agencies. At the present time, in-plant locations earn 3% commissions while other locations earn 10%. Therefore, retention of the 20 percent rule is not necessary to retain in the program carriers that would individually choose not to compensate BTD's as agents. Exclusion of BTD's that are willing to meet the standards of the programs would therefore not seem necessary to their continuation.

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[277] Notice of denial of appointment or withdrawal of appointment has the effect, under current rules, of foreclosing the use of another carrier's validation plate to write tickets involving transportation only on the non-appointing carrier. When a non-appointed carrier is included on an interline itinerary, no commission is paid on that segment. See ATC-IR-72.

We conclude, therefore, that the 20% and common control rules may tend to lessen competition. Nevertheless, as discussed above, we will approve them for a two year period to allow changes in our regulatory policies to take effect and to preclude distortions of the travel agency programs. [278] During this time, carriers can determine whether to keep the existing rules or modify them in response to the demands of the antitrust laws.

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[278] For the same reason, we will approve for a two year period the ATC provision that precludes any customer of an agency from having an ownership interest in an in-plant agency. ATC Resolution 90.3 §XVI.C.3. This provision is founded on essentially the same considerations as the common control and 20% rules.

B. Carrier Commissions

The ATC agreements currently prohibit member air carriers from paying another carrier a commission.[279] Judge Yoder believed this provision should be disapproved on the ground that it requires major carriers to subsidize transportation sales to lesser carriers. Hawaiian Airlines and Aloha Airlines have filed a combined brief opposing this change. They argue it would have extremely adverse consequences for small certificated air carriers. Because larger carriers write more tickets for smaller carriers than smaller carriers write for larger ones, the payment of commissions on such tickets would be a substantial revenue drain on small carriers. In addition, they argue that the revenue transfer will give larger carriers an unfair competitive weapon. The carriers state that the impact will be particularly severe on them because so much of their traffic is generated on the mainland.

American Airlines responds that there is no justification for the provision in the record. It argues the provision is anticompetitive because it sets commission rates at zero. Moreover, the absence of a comparable provision in the IATA agreements makes it clear that the provision can be eliminated without adverse effects. American also maintains the agreement does not even apply outside the continental U.S. so that it does not now protect either Hawaiian or Aloha. With respect to obtaining an unfair advantage, American replies that the existing agreement, in effect, provides for cross-subsidization of smaller carriers' ticketing costs by larger carriers.[280]

We conclude that the ATC restriction on the payment of commissions to other carriers may serve some purpose in facilitating interlining between air carriers. As we have already noted, however, the efficiencies of the passenger agency agreements are separate and distinct from those of the interline agreements.[281] The extent to which air carriers interline with one another, and whether there is a payment for doing so, should be left to the negotiations process. For that reason, the carrier commission provision should be eliminated from the passenger agency agreements. In view of the fact that we have provided for a two year period for carriers to modify interline agreements, we will also approve the carrier commission restriction until December 31, 1984.

C. The IATA Airport Restriction

BDA, American Express, AAA, ARTA, ASTA, DOJ and DOT challenge the IATA provision which forbids the location of a travel agency on airport premises.[282] They maintain it represents an unreasonable restriction on the ways in which a travel agent can conduct its business and denies the public a wider choice of outlets from which to purchase air transportation. IATA supported the provision on the grounds that it precludes the unnecessary duplication of carrier services at airport locations.

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[279] ATC Resolution 90.3 §XXI.L.

[280] Major carriers must raise their prices to cover unreimbursed costs, while smaller carriers can charge lower fares. The unfair advantage, then, goes to smaller carriers. AA Reply Brief to Board at 11-12.

[281] *See*, page 58 n.109, *supra*.

Judge Yoder concluded, and we agree, that the provision should be disapproved. We adopt his finding that permitting agencies to locate at airports will result in increased convenience to the public and increased competition in the distribution of air carrier services. It will allow travelers to obtain the counseling services travel agents frequently provide.

D. Ticketing Machines on Customer Premises

American Express would like the Board to disapprove the provisions of the ATC and IATA agreements that prohibit travel agents from placing unattended ticketing machines on the premises of corporate customers.[283] American Express compares ticketing machines to ticket delivery services agents now provide, except that ticketing machines would be faster and more convenient. A customer would only have to place a call to the travel agent and the ticket would appear in the machine.[284] Only air carriers can install ticketing machines at the present time. American Express believes this is an unnecessary restraint on their ability to compete. It rejects the notion that the limitations are necessary to maintain ticket security and to maintain inventory control. As long as an agent assumes the financial responsibility for the tickets, American Express sees no reason why agent sponsored machines should not be permitted.

ATC indicates that the fact that only carriers may engage in the practice is no basis for disapproval of the provisions. Each carrier would be assuming the risk of placing its own tickets in a given location, unlike the travel agent situation where hundreds of carriers would be put at risk by one agent. Without the prohibition, ATC maintains it could not continue to monitor ticket flows through travel agents to spot ticketing abuses or track down outstanding ticket stock when an agent ceases doing business.

Judge Yoder indicated that the provision should be approved. He concluded that its disapproval would result in the use of unstaffed,

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282/ IATA Resolution 802 §C(14). ATC eliminated its comparable restriction in 1979. IATA's members considered whether to eliminate its provision, but the effort failed because one carrier voted no. I.D. at 120.

283/ ATC Resolution 90.3 §XI.H. The provisions that require agents to do business only at an authorized location would also seem to prevent this practice. Rather than disapprove all the provisions that prevent the practice, American Express suggests specific language to be added to the agreements to accomplish that result.

284/ The machine would be travel agent activitated.

unapproved locations. This, he felt, would make it more difficult for ATC to monitor the use and security of standard ticket stock. It would also subvert the in-plant rules. American Express responds that these concerns can be alleviated by incorporating a provision into the resolutions requiring that ticketing machines be under the control of an agent operating from an approved location. [285] It also argues that the provision constitutes an unlawful collective restraint on travel agents' freedom to compete with carriers for commercial business.

We have decided to approve the provision. ATC has shown that it has been able to limit air carrier losses due to travel agent fraud or default by requiring sequential use of numbered blank ticket stock. [286] ATC could not use this mechanism if travel agents were free to place portions of their ticket stock where they wished. As such, the provision is related to legitimate objectives of the program.

Judge Yoder also concluded that these considerations did not apply if a carrier's own ticket stock was used in an unattended machine. In his view, individual carriers should be free to decide whether to entrust their own ticket stock to an agent to be placed in unattended machines. He conditioned continued approval of the ATC and IATA agreements on the adoption of such clarifying amendments. While a flat prohibition on self ticketing machines seems to go further than is necessary to accomplish these objectives, we prefer that ATC and IATA review their provisions themselves and revise the rules to more carefully meet their objectives. We will not, then, condition our approval on the adoption of such amendments.

E. Common Carrier Exclusion

BDA asks the Board to disapprove the ATC provision that prohibits a person from becoming an agent if it is an officer or employee of a transportation company, or a common carrier, other than a tour bus broker or an air passenger charter operator. [287] The provision apparently has very little effect because virtually anyone who would be disqualified under this section is permitted, under ATC procedures, to create a subsidiary to be the nominal applicant. ATC makes no effort to look beyond the corporate structure and the rule is readily circumvented. Consequently, BDA argues the provision should be disapproved as inconsistent with the public interest.

Judge Yoder agreed with the Bureau and concluded that the provision should be disapproved. He found it is readily circumvented and that IATA has experienced no ill-effect by not having a comparable restraint.

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[285] American Express Brief to Board at 7.

[286] Saunders (ATC) 46 Tr. 59-65, Meinkoth (American), 56 Tr. 36-37.

[287] ATC Resolution 90.3 §IV.D.3.

ATC asks the Board to reverse the ALJ and approve the provision prohibiting common carriers from becoming agents. ATC argues that the provision is based on its concern about possible conflicts of interest, probably the possibility of an agency preferring its carrier owner. It states such conflicts can be satisfactorily isolated and identified if an agent were a separate entity subsidiary of the common carrier.

We adopt the Judge's findings. We can see no reason to conclude that a wholly-owned air carrier subsidiary is less likely to favor its parent carrier over other carriers than the air carrier itself. Moreover, differences in commission rates, bias in ticketing equipment and other factors all come into the decisionmaking process when an agent is choosing on which carrier, among those suitable to its customers, the passenger should be ticketed.

F. In-plant Rules

The ATC and IATA rules both provide that a travel agency can expand by adding "branch" offices. Generally a branch office must meet the same requirements as the home office except ATC does not require the posting of a new bond and IATA has imposed a smaller working capital requirement. [288] An "in-plant" is a special kind of branch office under the ATC rules. It is a branch located on a customer's premises.

1. Re-instating IATA's In-plant Rules

In late 1979 IATA reformulated its passenger sales agency resolutions. Most of the changes were, IATA maintained, merely technical and not substantive. In this category of allegedly "technical" changes was a deletion of IATA's special in-plant rules. It was not clear, at that time, whether the changes would place additional burdens on travel agents. Taking IATA at its word, the Board approved the deletion of its in-plant rules insofar as it was consistent with the Board's standard for approval of agreements at issue in the pending Marketing case: that policy was to approve changes so long as the resulting agreement was not more onerous than the one it replaced. Because of the special concern that the changes would make becoming an in-plant more difficult, the Board indicated it would entertain petitions for reconsideration of its approval of the change if anyone was injured by it. [289]

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[288] It requires $5,000 in additional working capital instead of $15,000.

[289] Order 80-7-112 at 6, July 30, 1980.

Some of the IATA in-plant rule changes were more liberal. 290/ But it was more restrictive in one important respect. It required in-plants to meet the personnel standards applicable to other agencies. That is to say, there had to be a person on the premises with two years managerial experience and someone with one year's ticketing experience. The ATC rules exempt in-plant locations from the open to the public and personnel requirements. 291/ As a result, it is much easier to become an in-plant agent under ATC rules. The IATA restrictions prevented a large increase in the number of IATA in-plant locations, while there was a dramatic growth in ATC in-plants. 292/

American Express, in its brief to the Judge, asked that we reinstate the prior IATA in-plant rules. In its view, the IATA change has produced a major problem, preventing the approval of three out of four in-plant applications. Travel agents, and corporate customers, apparently find the differing IATA standards confusing and troublesome. American Express indicated IATA is voluntarily trying to find ways to solve the problem. If IATA does nothing, American Express asks the Board to reinstate the IATA rules along the lines of those of ATC. AAA also requests this change.

Judge Yoder agreed that additional provisions concerning IATA in-plant operations are necessary. He indicated IATA should conform its resolutions to its practices in the approval of in-plants, or change its resolutions and practices. He would not, however mandate IATA conformity to current ATC in-plant procedures. 293/

While we agree that the IATA in-plant rules should be clarified, we will not require any changes in the IATA in-plant resolutions. We have already indicated in general terms, that basic personnel and location standards serve legitimate carrier interests. We believe that carriers should be free, given their legitimate interests, to make other changes in their programs they believe are desirable.

290/ In-plants do not have to be branches of a regular agency location as is required by the ATC rules. Also, there is no special "open to the public" requirement that might prevent an agency from receiving accreditation for a location on a customer's premises. An agency on a customer's premises is "open to the public" if any person on the customer's premises can purchase travel services there. It does not require the location to permit sales to persons off the street. Ruggiero (IATA) 57 Tr. 28, 63 Tr. 135-136.

291/ In submitting Resolution 90.3, ATC would have imposed personnel standards on in-plants and eliminated its open to the public exception. When ATC admitted that this would make accreditation more difficult, we disapproved the rule pending completion of this case. Order 80-8-161 at 4-5.

292/ While the number of ATC In-plant locations increased to about 168 between February 1979 and October 1981, Saunders (ATC) 43 Tr. 158, the number of IATA In-plants in the same period went from 11 to 59 in roughly the same period. Ruggiero (IATA) 57 Tr. 18.

293/ I.D. at 125. However, he would condition approval of the IATA agreements on the submission of clarifying amendments.

2. Require IATA to adhere to Trans-Mark

By Order 79-2-92 February 15, 1979, (Trans-Mark) the Board approved an agreement between an ATC agent operating on a customer's premises (i.e. an in-plant) and the customer corporation to share an employee. The "shared" employee would be carried on the customer's payroll, but would spend a portion or even all of his time working in the agency. The travel agency would reimburse the customer for the portion of his time spent on agency business.[294/]

Because employee-sharing reduces air travel costs and affords corporate customers more control over how air transportation marketing services are provided, they have become a very popular method of handling corporate travel. [295/] After Trans-Mark the number of in-plant locations went from about a dozen in 1979 to 168 in the summer of 1981. [296/]

The Trans-Mark decision was reached at a time when the Board was still extremely concerned about rebating. The notion was that if a purchaser received even an indirect benefit not available to other passengers, it was an unlawful rebate under section 403. The argument was that the employee's salary was such an indirect benefit. The Board rejected that position and found that the arrangement would only result in reasonable compensation for the benefit gained from the use of the employee. [297/]

By its terms, Trans-Mark only applied to ATC in-plants, not IATA in-plants. BDA and NPTA now asks us to require IATA to adhere to Trans-Mark. BDA argues that this restriction, particularly because we have already found it not to be a rebate, is adverse to the public interest. NPTA maintains that there is no basic reason to prevent cost sharing for both international and domestic sales.

Judge Yoder concluded that there was no basis for requiring IATA to adhere to Trans-Mark, given his conclusion that IATA be free to reformulate its in-plant rules.

294/ To insure that compensation did not exceed the benefit gained, the Board placed a number of conditions on such compensation arrangements. In view of our decision in the Tariff Flexibility Rulemaking, the conditions we placed on employee sharing transactions are clearly no longer appropriate.

295/ Business Travel Departments (BTD's) afford corporations similar control over their travel arrangements, but since corporations cannot now earn commissions on BTD sales, they are more costly.

296/ Saunders (ATC) 43 Tr. 158.

297/ For the reasons discussed above, the ATC rule precluding an agent from paying a customer rent for space used and privileges granted on a customer's premises ATC Resolution 90.3 §XVI.D.1. is no longer justified. For that reason, we will disapprove the provisions in to that effect. ATC agrees the provision should be disapproved, as did Judge Yoder. I.D. at 123.

We do not agree that an IATA decision to eliminate special in-plant rules eliminates the need to consider the application of Trans-Mark to IATA accredited agencies. The IATA rules will, in any event, provide for the location of agencies on the premises of commercial customers. Those agencies may wish to take advantage of the freedoms of the Trans-Mark decision. It is clear that our current policies would permit an agency to share an employee with a customer without violating our rebating policies, even if the agency only sold international air transportation. As we noted above, we have permitted international carriers to compensate persons for providing services in connection with the transaction without requiring that a special price be filed. The same reasoning applies to an agency transaction with individual customers. For that reason, IATA cannot proscribe agent reimbursement of customers where the customers provide services or facilities to them.

3. The ATC Branch Office Requirement

There is one aspect of the IATA resolutions that BDA and DOJ believe is an improvement over its ATC counterpart. The IATA agreements do not require agencies located on customer premises to be branch locations. A location on a customer's premises can be a home office under the IATA rules, but not under the ATC rules. BDA and DOJ do not indicate, however, whether these new locations should be exempted from personnel standards. The reason ATC requires branch status is because ATC has exempted in-plants from the personnel requirements. In such instances, ATC wants a fully accredited agency standing behind the in-plant. Since IATA in-plants are subject to personnel requirements, they need not be branches.

Judge Yoder rejected the proposed modification on the ground that the provision prevented the establishment of captive agents, i.e., purchasers posing as agents. We will approve the provision although on different grounds. As we have already indicated, carriers' legitimate business interests justify standards in a number of areas. Given these areas of interest, the conferences should be free to impose unique standards as they choose on special types of agency locations. We conclude the requirement that in-plants be branches is within their area of discretion.

G. The Effect of the Board's Tariff Flexibility Rule

Our Tariff Flexibility Rule of September 1981 permits agents to charge prices less than those on file with the Board. However, we concluded that individual air carriers have the right to require their agents to adhere to the prices they set if they conclude that is in their economic interest. The choice must be an individual one. We specifically foreclosed joint

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298/ For the same reasons, we will not require that ATC clarify their agreement, to indicate what constitutes a single in-plant location. See I.D. at 122-23.

carrier decisions on this question and joint carrier action to enforce individual carrier decisions.[299]

Three provisions of the ATC agreements are attacked as inconsistent with our decision. One provision states that an agent shall not rebate so long as it is a violation of the law.[300] American Express argues it should be disapproved because it may obligate agents not to rebate, despite the exemption in the tariff flexibility rule that legally allows rebating. DOT believes it should be disapproved in order to remove obstacles that prevent agents and carriers from entering into pricing and marketing relationships different from those prescribed in the ATC agreement.

ATC responds this is merely a restatement of the law. In any event, it indicates its intention of eliminating it on January 1, 1983. Judge Yoder recommended it be approved, since it was expressly coextensive with the law.

A second provision that is attacked as inconsistent with tariff flexibility is that agents shall comply with all instructions of individual carriers. It also states that the agent agrees to adhere to and comply with the tariffs, rules and regulations of carriers.[301] BDA argues that it may be used to compel agent adherence to a carrier's pricing instruction. This section in conjunction with one that terms a sale at less than tariff prices an "irregularity,"[302] would appear to require the ATC Travel Agent Administrator to withdraw all traffic documents and all air carrier plates from an agent if an agent acts contrary to one carrier's instructions.

ATC essentially agrees with BDA that collective enforcement of the "rebating", "tariff adherence" and "irregularity" provisions would be inappropriate. However, since the provisions relate to many matters beyond enforcement of individual carrier pricing decisions, it asks that the Board not disapprove them. Rather, it suggests they be approved subject to the condition that ATC shall not enforce individual carrier pricing instructions. It states that it does not intend to do so in any event.

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[299] See Order 81-9-167 September 30, 1981 at 2. denying petition for stay of Board's tariff flexibility rule.
[300] ATC Resolution 90.3 §VII.K.
[301] ATC Resolution 90.3 §VII.J.
[302] ATC Resolution 90.3 §XIV.A.6.

Judge Yoder concluded that the provisions should be modified to conform to our tariff flexibility decision. He found that we should require §VII.J to be amended to provide that agents comply with price tariffs only if so instructed by individual carriers or required by CAB regulation. He would revise §XIV.A.6 to delete reference to collective action.

We will disapprove the provisions. As written they are inconsistent with our decision on tariff flexibility, even though they may not be applied in a fashion contrary to our decision, or be revised to be consistent with it. If carriers wish to retain the provisions in a form modified to eliminate inconsistencies with our decision and that passes muster under the method of analysis we have devised here, they are free to agree to new provisions and submit them for our approval.

H. Control of Carrier Traffic Documents

BDA argued to the ALJ that several provisions of the IATA and ATC agreements have the effect of giving ATC and IATA a significant control over unilateral (as opposed to ASP) carrier/agent settlement processes. For example, ATC automatically withdraws carrier traffic documents (as well as standard documents) from agents who have defaulted on conference stock. They also remove carrier stock from agents who have violated the terms of the conference agreements. As with the exclusivity provisions, BDA believes these provisions deny carriers a choice in determining with whom and on what terms they will deal. 303/

IATA responded that its provisions are merely control mechanisms in the trust relationship between air carriers and agents. In its view, the provisions are incidental to the appointment process and should be approved. ATC answered that disapproval of the provisions would be warranted only if the exclusivity provisions are also disapproved. Even then, ATC argued some provisions should be retained.

Judge Yoder dismissed BDA's arguments as moot in view of his recommendation that exclusivity be approved. 304/

303/ ATC Resolution 90.3

Section II (definition of Traffic Document)
Section VI.C (penalties for failure to comply with rules concerning change of ownership of agency)
Section VIII.C., D., E. (reporting requirements, default and maintenance of bond)
Section X.H. (general authority to use carrier-supplied documents)
Section XI.B.C., F., H., J. (issuance of documents by carriers and use by agents)
Section XII. (security requirements for documents)
Section XIII.A. (maintenance of agent records)
Section XIV.A (inspection for agent breaches, and enforcement by Travel Agent Administrator and Director, Office of Enforcement
Section XXV.D. (termination of agreement with agent)

IATA Resolution 802

Section B (definition of Traffic Document)
Section E(1) (prohibits carriers from placing non-standard traffic documents with other than Approved Agents)
Sections FF(5), FF(7), FF(8), FF(9), FF(10), L(2), L(3), L(4), L(5)
and M(5) (penalties in response to agency infraction of the IATA rules)
Sections H(3)(c), H(3)(d) and H(3)(e) (restrictions on the ability of carriers to deal with an agency that failed to comply with rules concerning change of its name, ownership or location.)

304/ I.D. at 129 n.1.

In their briefs to us, BDA and DOJ raise their earlier arguments. They state that industry control over the use of individual traffic documents is inconsistent with our orders limiting industrywide control over a carrier's relationship with individual conference agents.[305] The rules require the return or withdrawal of all traffic documents in specific circumstances, including individual carrier stock.

ATC answers that certain provisions must be retained in any event. In support, it lists the provisions that state that identification plates, among other things, remain the property of the air carrier, that traffic documents be surrendered on demand, and that documents are given to agents for issuance at a specific location and may not be issued elsewhere.[306] ATC also indicates that the provision requiring agents to apply the same safeguard to individual carrier stock as standard stock should be approved. Carriers will want their individual stock to be as secure as standard stock.[307]

While BDA is correct that the conferences should not control individual stock, some of the provisions may legitimately affect ASP settlement as well as individual carrier/agent relationships. Accordingly,we will dissapprove the provisions only to the extent that they involve industry control over individual carrier traffic documents.

I. Compensation for Subsequent Applications

IATA forbids member carriers from compensating passenger agency applicants who have been disapproved or removed from accredited status within the past year.[308] The rule has been justified as necessary in order to prevent the unqualified applicant from continually reapplying in order to receive compensation for sales made during the pendancy of the applications.[309] Judge Yoder concluded that eliminating such unscrupulous practices was a permissible objective and found that the provision should be approved.

BDA attacks the rule as an unnecessary restraint on competition. In its view, it unnecessarily imposes a hardship on persons who wish to correct the problems that led to the disapproval of their first application. It asks the Board to compare this rule to the rule in the cargo area which, in its application, prevents compensation for a subsequent application only when the application is absolutely identical to the first. 310/

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[305] It cites Orders 79-11-18, 80-7-103 and 81-12-45.
[306] ATC Resolutions §XI.C, F., and H. respectively.
[307] ATC Resolution 90.3 §XII.
[308] IATA Resolution 802 §6(3)(b).
[309] Ruggiero (IATA) 62 Tr. 133.

We agree with the suggestion that IATA should attempt to limit the burden its rule places on disapproved applicants, perhaps as they have done with cargo. But it is also true that prospective applicants should bear some responsibility for the adequacy of their applications. IATA should be spared the burden of repeatedly denying the same application. For that reason, we conclude that the provision is not a substantial restraint on competition and leave it to IATA to make any changes it feels are necessary in the provision. We urge IATA to consider the revisions that have been suggested.

J. General Sales Agents

A General Sales Agent (GSA) is a special type of agent provided for in the IATA resolutions A GSA's primary purpose is to represent a carrier in thin markets far from the carrier's home country. Generally, GSA's are given control over their carrier principal's market decisions in their assigned areas. 311/ The IATA resolutions impose few restrictions on GSA contracts, the primary one being that the GSA's territory be specifically identified and be its exclusive area. 312/

Usually, carriers select other airlines to be their GSA's. However, there is no requirement that a GSA be another air carrier and some GSA's are private individuals or companies. 313/ During the course of the Marketing hearing, it was disclosed that a GSA could engage in the retail sale of air transportation on a carrier's behalf without being subject to the accreditation requirements of the IATA resolutions. Moreover, there is no limit on the number of GSA's a carrier can appoint. 314/

Because of these revelations, IATA proposed to apply the usual accreditation and retention standards to passenger and cargo GSA's. BDA opposed the amendments. BDA believed the primary purpose of the change is to reinforce the exclusivity rules, which it opposes and believes should be disapproved. Even if exclusivity remains, BDA believes the amendments should be disapproved because the primary purpose of GSA's is to function in place of direct air carriers. Carriers must know and have trust in and confidence in the persons they select to be their GSA's. The IATA amendments would, in their view, substantially limit carrier freedom in making their selection.

310/ Ruggiero (IATA) 86 Tr. 27-29. The provisions of the IATA Cargo Agency Resolution that deals with compensation for applicants are §B(6)(a)(IV) of Resolution 803 and §B(a)(c) of Resolution 811. Judge Yoder would have required that the provision be modified to reflect current practice. We will not require the change. We prefer that IATA take action to limit its application.

311/ IATA-T-2 at 34-35.

312/ IATA Resolution 876a §12.

313/ IATA-IR-19.

314/ Ruggiero (IATA) 60 Tr. 72-74.

Judge Yoder found that the record did not disclose abuses of the general sales agent concept that required adoption of such an amendment. He would leave it to IATA to adopt such a provision. We will adopt his conclusions on this issue as our own.

Judge Yoder did not address another issue BDA raised with respect to the GSA agreements. They argued that provisions of the GSA resolutions that required that a single GSA be given an exclusive territory be disapproved. In its view, these provisions are prima facie anticompetitive in that they amount to collective market allocations. While there is no reason to foreclose individual carriers from establishing exclusive GSA territories, they contend that carriers cannot collectively do so.

We agree with BDA that the territorial exclusivity provision of the GSA agreements should be disapproved as a substantial restraint on competition. No one has suggested a way that competition is benefited by these agreements. In fact, they appear to do nothing more than restrain the circumstances in which carriers can deal with general sales agents. For that reason, we have decided to disapprove the provisions requiring passenger GSA's to have exclusive territories.315/

K. Miscellaneous Provisions

Our discussions above address all the changes in the ATC and IATA passenger agency agreements that parties have argued should have been made or were improperly made by the ALJ. In addition, there are a number of changes the ALJ recommended, which no one has objected to that we will adopt as a part of this decision.316/

These revisions are:

1. Removing the IATA restraints on agency compensation; IATA Resolution 802 §G(2) I.D. at 147-149. We will disapprove IATA Resolution 802 §G(9) to the extent that it prevents carriers from agreeing to allow an agent to retain remuneration paid on refunded tickets.

2. Approving changes in IATA terminology for airline-agent financial relationships; I.D. at 150-51. But we will not require that these changes be made.

315/ IATA Resolution 876a §(12).

316/ In our orders addressing the issue of whether new resolutions or amendments to resolutions should have been consolidated into this proceeding, certain provisions were not consolidated. Most of those provisions have, however, been granted interim approval pending a final decision in this proceeding. See e.g., Orders 80-7-112, 80-9-161 and 80-10-94. We will address the issues of indefinite approval for those provisions and the conferral of antitrust immunity in an order to be issued in the near future.

3. Modifying the IATA Travel Agent Commissioner program; I.D. at 158-160. IATA Resolutions 802d and 802e.

4. Rejecting the evidence submitted by A.V. Costantini. I.D. at 52 n.1.

We now begin our examination of air carrier settlement systems, the third major category of agreements before us.

THE AGENTS STANDARD TICKET AND AREA SETTLEMENT PLAN AND OTHER SETTLEMENT PROCEDURES

A. History

In the beginning of the ATC conference program, individual agents settled with individual carriers directly. By the 1960's, the growing burden on agents of filing multiple reports and the administrative costs for carriers of auditing individual agent reports led ATC to develop a centralized settlement mechanism called the Agents Standard Ticket and Area Settlement Plan. The central features of the original plan, which remain in effect today, are the use of standard traffic documents and airline validator plates in lieu of individual carrier tickets and the submission by each agent of a single unified sales report for each reporting period covering sales on all ASP airlines.[317]

As originally approved in 1964, the agreement provided for reporting of cash sales three times a month and for daily reporting of credit transactions. Agents were still required to do a substantial amount of processing, including the transfer of ticket data to sales reports and calculation of remittances. In addition, the agreement provided for monitoring of agency reporting performance by ATC with a series of "demerits" or late remittance charges for irregularities.

Prior to the ASP, agents were required to report twice monthly with a five to seven day grace period. Under the original agreement submitted by ATC, the ASP would have required thrice monthly reporting with a two or three day grace period. ATC justified the change on the grounds that carriers would bear fully the costs of the new system and the efficiencies it produced would benefit agents as well as carriers. The carriers argued that they were entitled to recover their costs through improved cash flow. The Board agreed in principle but found that the cash flow to be produced by the schedule submitted by ATC would exceed the carriers' costs and was therefore not justified. In approving the agreements, the Board took the same approach as it had with other provisions, i.e. it weighed the additional restrictions of the agreements against the efficiency gains. We therefore required ATC to extend its grace period. [318]

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[317] ATC Resolution 90.10 embodies the agreement between air carriers generally referred to as the Area Settlement Plan. Under this heading we will also refer to the provisions of the ATC agreements dealing with travel agent participation, which may be found in ATC Resolution 90.3 §VII.

[318] Order E-20741, April 24, 1964.

Since its original approval, two categories of significant changes have occurred. One was in the procedures themselves. In 1974, ASP was modified to provide for computerized processing, with an increase in cash reporting frequency. This was accompanied by a reduction in paper work burden for agents and extended reporting periods for credit sales. (Order 74-8-81, August 21, 1974.).

The other category of change involves carrier participation. Shortly after the ASP was implemented non-ATC carriers recognized the benefits of centralized settlement through the ASP. In less than a year after the Board's original order, ATC submitted, and the Board approved, an amendment providing for participation by IATA carriers. (Order E-21497, November 14, 1964). Today carriers holding any form of authority from the Board authorizing scheduled service are eligible to participate. 319/

One of the most important questions in these participation cases has been the freedom of participating carriers to settle with ATC agents outside the Plan. Carriers originally had this freedom through the use of individual carrier stock. In 1975, however, the Board approved an agreement requiring ASP carriers to withdraw all individual stock from ATC agents, thus forcing carriers to use the ASP on an all or nothing basis. (Order 75-8-114, August 21, 1975).

By Order 78-3-63 March 15, 1978, the Board reopened its approval of the mandatory participation provision and ultimately disapproved it. ATC had argued that the efficiencies of the Plan were substantial and that any departures from the Plan would reduce the efficiencies. The Board rejected these arguments, and disapproved the agreement. It found that the mandatory participation was a restraint on competition because it reduced the freedom of competing carriers to negotiate settlement terms. It also found that the efficiencies of the ASP would themselves lead to its use, especially in an increasingly competitive environment. On that basis, the Board found that the mandatory participation rule was a restraint on individual carriers' competitive freedom to negotiate settlement terms which was not required to produce the efficiencies of the ASP. It could not be approved under section 412. 320/

B. Operation of the ASP

Under the ASP, agents are required to report and remit sales on a weekly basis. The reporting period runs from Monday through the following Sunday. The agent is required to report sales to its area bank by the Tuesday following each sales period.

There are six area banks in the U.S., each of which is responsible for agents in particular states. The area banks are selected by ATC under fixed term contracts and there have been some changes in area banks over the years.

319/ See Orders 79-11-18, 19, and 20, November 1, 1979.
320/ Order 79-11-18, November 1, 1979, and the orders cited there.

The agent's sales report consists of an adding machine tape for cash transactions, a second tape for credit card transactions, underlying tickets and other documents, and a settlement authorization which specifies the amount which the area bank may draw on the agent's own bank. Tickets in the agents' hands are numbered sequentially and are to be used in sequence.

Once the area bank receives the report, it calculates the total amount owed by the agent by deducting commissions, which are indicated on traffic tickets from the sales price of the ticket. In addition the area bank calculates the amount owed to each ASP carrier.

The area bank will also prepare a detailed sales report for the agents and a summary report to airlines. On the Wednesday after a report is received, the area bank will draw on the agent's own commercial bank for the total amount owed by the agent subject to the settlement authorization, and it will credit the individual airline the amount due to it.

The ASP also monitors the agent's performance of its payment obligations. Reporting irregularities such as reporting a ticket out of sequence, returned checks, and failure to turn in a report result in the assignment of "late remittance charges." Accumulation of six such charges in any 12 month period results in review by the travel agent commissioner. If, upon review, the commissioner finds that the agent was at fault, the commissioner can impose penalties ranging from fines to removal from the accredited agency list.

C. Competitive Analysis

As with common accreditation, we examine first whether the concept of the centralized clearing house is, in itself, anticompetitive. We have concluded that it is not.

The clearinghouse mechanism produces substantial efficiencies for both agents and carriers. Carriers save the accounting costs of auditing thousands of agent reports because the Plan provides them with weekly sales reports. These cost savings can be quite substantial. [321] The cost savings also facilitate new entry because the costs of supplying new agents with validator plates and having them report through the ASP is much lower than the cost of processing a new agent's sales report individually. [322]

The agent enjoys similar costs savings benefits. It is required to file only a single report as opposed to filing reports for each carrier on which it has sold transportation. Computerization further reduces the reporting burden for agents. [323]

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[321] See I.D at 172, *See also* ATC-ASTA-20 at 57, 58 and JRC(CO)-T-2. ATC-JRC (EA)-14 indicated that the cost to Eastern per ticket is 18¢.

[322] Meinkoth (American) 56 Tr. 38-39. *See also* AA-RT-2a and 3. American indicated that it would not give stock to every agency that currently holds its plate if the ASP were eliminated. Thus, to the extent it increases the number of distribution outlets, the ASP facilitates actual and potential competition.

[323] ATC-T-1 at 10, ATC-T-2 at 44, 54, AAA-T-1 at 2-3.

In short, the ASP clearinghouse produces efficiencies which are recognizable under our competitive analysis. We conclude that the concept itself is not a substantial restraint on competition.

Indeed, no party has seriously challenged the concept for a settlement clearinghouse as anticompetitive in this proceeding. Numerous clearinghouses exist in other industries and air carriers maintain separate clearinghouses for intercarrier settlements. 324/

Having approved of the concept of the ASP, we must also consider particular provisions to assure that they do not involve restraints which are unnecessary or excessive to achieve the competitive benefits of the ASP.

D. Particular ASP Provisions

Competitive questions have been raised regarding two aspects of the ASP. ARTA has challenged the fixed reporting and remitting schedules. Secondly, DOJ has raised the question of access to the ASP by non-accredited retailers.

1. Reporting and Remittance

The ASP requires all agents to report sales on a weekly basis and provides for remittance in the form of drafts drawn on the agent's commercial bank eight days after each report is filed.

As a means of enforcing these rules, ATC assigns penalties called late remittance charges for reporting irregularities as described above.

These rules were challenged by ARTA as an anticompetitive fixing of credit terms which is per se illegal under Catalano v. Target Sales. 325/ ARTA also argued at one time that either of two modifications would eliminate the restraint. ARTA first suggested that the ASP only be permitted to process a uniform sales report and identify amounts owed to individual carriers. Carriers and agents would then set remittance periods individually and remittance could be accomplished through the ASP. Alternately, ARTA suggested that the ASP could be modified to provide a choice of weekly or twice monthly reporting and remitting. Although DOT questioned the rules establishing fixed reporting and remitting rules at earlier stages in the proceeding, it does not at this time. 326/

The ALJ rejected ARTA's request, concluding that it would substantially reduce the efficiencies of the Plan, and lessen the integrity of standard stock.

324/ The Board disclaimed jurisdiction over the ATC airline clearinghouse in Order 2829, May 1, 1944.

325/ 446 U.S. 643 (1980).

326/ DOT commissioned a study of reporting and remitting alternatives to those in the existing ASP, DOT-401, and concluded that none were presently available. DOT Br. at 13.

We reject the argument that the fixed reporting and remitting schedule represents the type of agreement fixing credit terms that was found unlawful in Catalano. 327/ The purpose of the ASP is fundamentally different. Under the ATC and IATA programs, funds collected by agents, less applicable commissions are held in trust by agents for the carriers. The settlement system is simply the means by which funds are transferred from the agent's account to the carrier's account. Parties have argued that the ASP is not an appropriate mechanism to use for extension of credit. Furthermore, carriers are free to negotiate credit terms with agents outside the ASP.

Although the fixed remittance schedule is not a credit fixing agreement, it is nevertheless a restraint on carrier practices which may have competitive implications. As we observed in disapproving mandatory participation rules, the fixed terms do restrain carrier freedom to negotiate settlement terms in conjunction with other elements such as commissions to develop an agency relationship which best meets its needs. Although agents hold money in trust, agents use this money while it is in their possession 328/ Thus, standard remittance terms could have economic and competitive significance and the fixed terms would interfere with normal market forces in the development of agency relationships.

We must therefore consider whether the restraints embodied by the fixed reporting and remitting schedule are necessary to produce the efficiencies of the Plan, and whether they are the minimum necessary to achieve these objectives. We conclude that they are.

The ASP produces efficiencies in two distinct areas. The first is in reporting and the second is in collection.

The reporting function of the ASP provides its basic benefits, and no one challenges that portion of the plan. It significantly reduces the paperwork burden on agents. Agents prepare one report for all ASP

327/ The agreement that was found unlawful contained a standard payment period during which buyers could make payments and receive a discount and also a period in which delayed payments could be made without incurring interest charges. The Court found that these kind of credit terms were so intimately connected to price as to bring them within the ambit of standards developed for price fixing agreements, i.e. that they were per se unlawful. It also found that the purpose of the agreements was to reduce competition in the extension of credit terms. 446 U.S. at 648-49.

328/ See pleadings of ARTA and ASTA in Docket 30933 and Order 78-6-210, June 30, 1978 therein, relating to proposed ATC agent's standard finance statement.

carriers instead of separate reports for each carrier on which it wrote tickets. There are currently over 120 carriers participating in the ASP. In fact, in approving the mechanized reporting system, the Board found that the cost savings to agents in not being required to calculate amounts owed individual carriers justified an increase in reporting and remitting frequencies.

If the ASP were limited to a reporting function only, individual carriers would have to take up the collection function themselves. With 18,000 agents the cost could be tremendous.[329] Many carriers have indicated that they would be forced by costs to reduce the number of agents they appointed if the remittance features of the ASP were eliminated.[330]

The potential collection expense would be increased even further because ASP monitors agent performance of settlement obligations. A remitting irregularity means more than just the failure to forward all money already owed. By placing blank ticket stock which they freely accept in agents' hands, carriers expose themselves to the risk of providing air transportation for which they might never be reimbursed. The remittance features of the ASP also perform the function of monitoring agents' continuing ability to fulfill their payment obligations, and permit carriers to reduce their risk by removing ticket stock and plates when the likelihood of non-performance arises. Thus, if ASP were limited as ARTA suggests, carriers would individually have to shoulder the burden not only of collecting past due amounts, but also of monitoring continuing performance of agents to protect themselves from undue risk. Indeed, American indicated that the remittance and performance monitoring efficiencies of the Plan were so important that if ASP were limited to reporting, it would develop its own reporting and remitting program using its own ticket stock as a more cost effective alternative.[331]

Introduction of variable remitting would likewise endanger the efficiencies of the Plan. The ASP would undergo substantial increases in monitoring costs, especially if an agent were on multiple remitting frequencies for each sales report. Carriers would likely have to increase their own monitoring and auditing efforts since the reliability of the ASP might be reduced.

Finally, having determined that it is reasonable for the ASP to contain fixed remittance schedules, we must consider whether the particular schedules are reasonable.

The existing schedules were implemented in conjunction with the computerization of the ASP.[332] The schedules were viewed by the Board as a reasonable "cost" to agents who obtained the benefits of simplified reporting and detailed marketing information which would result from computerization, especially since the ASP carriers were to bear the additional cash expenses of computerization. In fact, the schedule was developed after carrier consultation with agent groups.

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[329] ATC-RT-6 at 5-6, Nelson (Eastern) 47 Tr. 140; AAA-T-1, pp. 2-3.

[330] Meinkoth (American) 56 Tr. 32-34, JRC(OZ)-T-1 at 4, (Wilson (Ozark) 45 Tr. 174-175, AA-R2 at 2, 3. See also Wilson (Eastern) 47 Tr. 143, Knodt (ASTA) 68 Tr. 96-102.

[331] Meinkoth (American) 56 Tr. 38-39.

[332] Approved by the Board as reasonable in Orders 74-8-41, August 7, 1974.

The schedule has been in place for some eight years now. On the basis of information in the record, it does not appear to be onerous. Relatively few agents have been removed from the agency program because of financial defaults. 333/

Under these circumstances, we conclude that the existing schedule is reasonable.

333/ In 1979 agents were sent 6,662 letters with regard to reporting or settlement irregularities. Of those, 3,252 dealt with out-of-period reported tickets, 185 concerned failure to report, 2,063 were for untimely reporting, and 1,162 were for dishonored checks. ATC-T-2 at 21. But there were only 375 voluntary and involuntary deletions from the ACT agency list. ATC-IR-7.

2. Access by non-accredited agents

DOJ has argued that the ASP is a substantial restraint on competition unless it is opened to non-accredited marketers. It argues that the efficiencies of the ASP are so great that no alternate marketer could hope to compete effectively on a cost basis with conference agents. The higher settlement costs would severely undermine any other cost advantages that the alternative marketers might have.

The administrative law judge declined to require that access to the ASP be opened. Having approved agency exclusivity, the ALJ concluded that no "non-agent" retailers could be identified that were interested in using the Plan and that imposition of security provisions for "non-agent" ASP participants would either vitiate the existing accreditation system or give rise to a parallel one for non-accredited retailers.

ATC responds that it has no agreement that bars non-agent retailers from the ASP. It says it has never denied any retailer access to the Plan and cites its recent acceptance of agents accredited only by IATA. ATC also argues that the DOJ position is based upon no more than an unsupported allegation that carriers will not deal with persons who are denied access to the ASP. Action requiring ATC to accept other retailers would have to be supported by substantial evidence. They claim no evidence exists to show that a retailer who might use the Plan has been denied access.

We have not found a provision that restricts non-agent access to the ASP. As a result, no modification is required at this time. However, we agree with DOJ's conclusion that access to the ASP cannot be restricted in the future. Antitrust precedent clearly establishes that refusal to allow access to non-accredited retailers under reasonable terms would be a substantial restraint on competition. [334/] ATC has implicitly recognized this point by not preventing non-ATC carriers from participating.

Our starting point is the proposition that a restraint on competition must be necessary to produce the efficiencies of a joint venture and can place no greater restraint on competition than is necessary to accomplish its objectives. If access to the ASP were denied, a new marketer could not obtain the efficiencies inherent in the ASP. Marketers desiring to enter the industry would be at a severe disadvantage unless they could duplicate these efficiencies by establishing an independent settlement system. Because the ASP is virtually industrywide in the U.S., the cost savings from avoidance of duplication are maximized and the costs to

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[334/] U.S. v. Terminal R.R. Ass'n, 224 U.S. 383 (1912) and Associated Press v. U.S., 326 U.S. 1 (1945).

individual carriers of participating in the settlement program are minimized. 335/

Given the fact that ASP is in place, it would appear as a practical matter to be the only means of achieving settlement costs savings on a large scale in the U.S.

A number of cases under the Sherman Act provide that where a group of competitors control a facility or resource which is essential for effective competition, it is an unreasonable restraint of competition to deny access to the facility on reasonable terms to "outside" competitors. 336/ While the issue is not carriers denying access to their competitors, the cases establish the need to be vigilant in assuring that agreements on access to essential facilities do not have the effect of restraining competition.

Judge Yoder concluded that if retailers can get access to the ASP and its costs savings they will have no incentive to seek accreditation. Our difficulty with this reasoning is that it ignores the fact that common accreditation produces efficiencies for agents totally unrelated to settlement costs. 337/ The accredited agent will potentially have a much larger group of air carrier services which can be sold. Access to the ASP will not alone provide these benefits.

It is also argued that granting non-ATC/IATA agents access to the ASP will increase air carriers' risk of financial loss because unqualified persons will obtain blank ticket stock. However, carriers can impose restrictions to protect themselves against this risk.

The antitrust laws do not require access to essential facilities on any terms, but only upon reasonable ones. ATC currently has numerous rules pertaining to accreditation or ASP participation which are designed to minimize risk to carriers using the ASP. We believe that imposition of these requirements on nonaccredited retailers participating in the ASP would be reasonable. 338/

335/ The record indicates that where an industry settlement program is in place, a duplicate is not likely to arise. Thus when IATA was attempting to develop central settlement banks in various countries, it did not establish one in the U.S., but sought access to the ASP. Order E-21749, November 14, 1964. By the same token, when ATC carriers sought a centralized settlement system for Canadian agents, they did not expand the ASP, but gained access to the IATA bank settlement system. Order 78-8-31, August 7, 1978. On the basis of the record it appears that small groups of carriers have established settlement programs independently of the trade associations only in areas where neither ATC or IATA have established an industry clearinghouse. See *e.g.*, Nelson (Eastern) 47 Tr. 121, Proctor (IATA) 64 Tr. 18, Salyer (IATA) 58 Tr. 79-80.

336/ *U.S. v. Terminal R.R. Ass'n*, 224 U.S. at

337/ See pages 35-36, *supra*.

338/ ATC may require, for example, bonding provisions, ticket stock security requirements, and the fixed reporting and remitting sequence, as well as imposing penalties for non-adherence.

ATC need not, for example, deliver blank ticket stock to any person who indicates he intends to enter the marketing industry. Some form of carrier sponsorship provision might be reasonable, either in the form of proof of an agreement between a carrier and the unaccredited retailer or a statement by a carrier that it is planning to enter into such an agreement if the retailer gains access to the ASP. The premise of opening access to the ASP is that retailers desiring to enter into bilateral agreements with carriers have access to a low cost means of settlement. Moreover, in the absence of an agreement with a carrier, a non-retailer that gained access to ASP would have standard stock, but no validator plates. Thus the ASP would be required to keep track of potentially large amounts of "dead" inventory held by non-accredited retailers waiting for the possibility of negotiating a bilateral contract. 339/

Carriers are also placed at risk if ticket stock is stolen. If stock (and plates) are stolen, ASP participating carriers run the risk of honoring tickets written with the stolen materials, and their only recourse is to the agent from which the materials were stolen. 340/ Where the agent has never received money for these tickets, that recourse may not be adequate. However, carriers have adopted specific requirements designed to reduce the risk of theft in the first instance.

The ATC rules specify the maximum number of blank tickets which an agent can hold at any one time. Of the total, they also specify the number which can be held on premises and require that these and plates be stored in safes which cannot be easily removed from the premises. 341/ ATC requires proof that these rules can be met as part of its accreditation standards. 342/ To provide additional incentives for adherence ATC also provides for waiver of the agent's liability if the agent promptly notifies ATC of the loss or theft, if the theft was not accomplished by an employee of the agent, and if the agent was in compliance with the security regulations at the time of the incident.

It would be reasonable for ATC to impose similar security provisions as a condition for access to ASP by non-accredited agents. The risk to carriers of honoring lost or stolen tickets would appear to be equal without regard to the type of retailer from which they were stolen.

339/ This situation should be contrasted with our disapproval of the sponsorship provision in the ATC Agency Resolution Investigation. There, we were dealing with a condition on the very right to sell air transportation, and with evidence that it was being used to restrict entry for competitive reasons. Here we are dealing only with a settlement mechanism, and the existence of an actual or imminent contract with a carrier appears to be a reasonable element of the non-accredited retailers' ability to use it.

340/ Therefore, ATC might reasonably require a person wishing to gain access to the ASP to produce some evidence that an agreement exists or is imminent and require the expanding carrier to hold members of the Plan harmless from fraud or other misuse of blank stock .

341/ ATC Res. 90.3. Attachment B.

342/ See ATC Res. 90.3 §IX.6. providing that the agent is, in certain circumstances, liable for carrier losses as a result of lost or stolen tickets.

Extension of rules designed to combat these risks to unaccredited participants would therefore be reasonable. 343/

Carriers also face financial loss either when an agent either intentionally diverts funds from the carriers or is unable to meet its obligations because of incompetence. ATC has a variety of provisions designed to control these risks. Risks to the ASP can be minimized by adopting the same standards that now protect carriers from these threats.

First and foremost is the agency bonding requirement. Under the current rules, the bond is available to satisfy amounts owed to carriers when the agent cannot meet its ASP obligation whether through fraud or mismanagement. In the case of mismanagement, a non-accredited agent may pose a risk only to its appointing carrier. In the case of fraud, however, the risk may expand to other ASP carrier participants despite their efforts to prevent ticketing by the unaccredited retailer. Given these risks, a bonding requirement for non-accredited retailers would be reasonable. 344/

The other means by which carriers protect themselves against financial irregularities is through the reporting and remitting rules. Thus agents are required to report on a uniform schedule and to make funds available to ATC at a fixed period after each report. In addition, agents are required to file no sales reports if they have sold no air transportation during a reporting period. Finally, the standard tickets are distributed to agents in numerical sequence and they must be used sequentially. The failure to do so can result in a late remittance charge which in turn may lead to a review of agency status.

Many of these rules are directly related to the production of collection efficiencies inherent in the ASP and their application to unaccredited ASP participants would be justified on that basis. Some of them also reduce the risk to carriers from financial irregularities. Thus, the failure to report tickets in sequence may indicate an inability or an intentional refusal to remit all funds collected during the week. The inability to honor the ASP draft on the weekly remittance day could pose a financial risk to ATC participating carriers. Carriers clearly are not required to monitor for irregularities and take action to protect themselves only after a major breach has occurred. Application of these rules, including the late remittance charge provisions, with the threat of loss of the right to use the ASP, is reasonable under these circumstances.

343/ As to the requirements themselves, these were considered originally by the Board in Order 76-5-47, May 12, 1976. At that time the Board explicitly considered whether they imposed a burden on agents which was excessive in regards to the risk protection intent of the carriers and concluded that they do not. Nothing in the record of this case indicates that this conclusion is no longer valid, nor that security standards found reasonable for accredited agents are not reasonable for non-accredited agents with respect to ASP materials in their possession.

344/ The bond requirement must be reasonable in view of the potential risks. But it need not be identical in amount to that demanded of accredited agents.

While many of the terms and conditions relating to use of the ASP appear in the basic agency resolution,[345] it would be reasonable to impose the requirements on non-accredited retailers as conditions for ASP access. To the extent that ATC desires to do so, it may want to transfer these rules from the agency resolution to the ASP resolution or to duplicate them for application to non-accredited retailers. We will not require ATC to make such modifications at this time, relying on their representation that access is not restricted.

Our discussion of the reasonableness of imposing the various requirements on non-accredited retailers should not be construed as any type of requirement or endorsement for doing so, and by no means should they be construed as the Board's ruling on the minimum protection with which carriers should provide themselves consistent with the public interest under section 412. We have concluded only that imposition of these types of conditions, or any combination of them, would not be considered as a substantial restraint on competition.

D. IATA Settlement Provisions

The IATA Resolutions also contain provisions governing direct carrier agent settlement and related matters. The two most important areas covered are settlements outside the ASP and default procedures.

1. Non-ASP Settlement

IATA resolutions establish a settlement procedure for direct agent-carrier settlement outside the ASP. The procedures specify biweekly reporting and remitting. The resolutions permit carriers to establish alternate reporting and remitting cycles, but in no case can they be less than twice weekly.

The ALJ disapproved the provisions prohibiting more generous reporting cycles than the IATA specified rule. He concluded that the Board had previously disapproved restraints on outside settlement as contrary to the public interest, and that IATA had offered no justification for its restriction which had not already been rejected by the Board.

We will affirm the ALJ on this point. Agreements fixing settlement terms are restraints on competition as we have previously found.[346] While they may be justified as part of a centralized settlement system, because they contribute to efficiencies, they have no justification when standing alone. Our purpose in eliminating the mandatory use requirement for carrier participation in the ASP was to permit carriers the freedom to set settlement terms other than those specified by carrier agreement in the ASP.

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[345] Resolution 90.3 contains accreditation and retention standards while Resolution 90.10 relates specifically to the ASP.

[346] Order 79-11-18 at 5, November 1,, 1979.

The primary justification offered for the current rule is that it is necessary to protect carriers on whom agents write interline tickets from a cash flow crisis if transporting carriers demand their share of interline tickets before the ticketing carrier has collected from the agent.[347] This argument is a variation of the argument that the Board rejected in the context of disapproving the mandatory ASP participation rules.[348] IATA has presented no evidence to demonstrate that carriers setting their own settlement terms do not have the incentive or ability to protect their cashflow.

We will therefore disapprove the provision that precludes IATA carriers from offering more generous terms than that provided by IATA. We will not disapprove the IATA rules themselves. It is not a restraint on competition for IATA to establish procedures as guidelines or recommendation. The restraint comes from making the IATA provisions a mandatory minimum from which individual carriers cannot deviate.

2. Automatic Default Procedure

Several provisions of the IATA resolution require all IATA carriers to place an agent in default if a single carrier, using its own stock, places the agent in default.[349] IATA also provides for automatic collective default of a passenger agent upon default of a commonly-owned IATA cargo agent,[350] and for default to all IATA carriers if an agent is in default to the ASP. The ALJ recommended disapproval of all provisions requiring automatic conference-wide default and possible later adverse action based upon transactions using individual traffic documents, or removal of individual carrier stock based on defaults not involving that stock.[351] We affirm the ALJ.

As the ALJ correctly observed, when we have previously addressed this issue, in the context of the ATC agreement, we concluded that it was not in the public interest for the conference members to aggregate their economic power to take collective action against an agent where no collective danger exists. [352]

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[347] Ruggiero (IATA) 60 Tr. 157-64.

[348] Order 79-11-18 at 6, November 1, 1979.

[349] IATA Resolution 802 §FF (5)(a), (b), (c), (e).

[350] IATA Resolution 802 §F(6) FF(5)(d).

[351] Specifically IATA Resolution 802 §§F(6); FF(5)(a)-(e), (7)(a), (9)-(10); and L(2) (4).

The only justification offered for these rules is that a default to one carrier indicates a risk to all. As the ALJ correctly found, with the ASP in place and widely used, this justification is not sufficient. During the time before the ASP, when agents settled with all carriers directly, a default to one carrier could mean a risk to all if the agent were robbing Peter to pay Paul. With the advent of the ASP, however, this is no longer the case. If the agent is meeting its obligations under the ASP, it is by no means clear that a default to an individual carrier outside the ASP presents a risk of loss to any but that carrier. We are therefore disapproving the provisions calling for automatic collective action on the basis of defaults to individual carriers and conversely provisions requiring individual carriers dealing outside the ASP to place an agent in default automatically based on default to the ASP.

As in the case of ATC, however, we would not object to a provision specifying that collective action will be taken after an impartial finding that the default in question represented a risk to all carriers. Nor would we find it objectionable if IATA carriers informed each other of their individual default actions so that other carriers could take whatever individual action they deem appropriate. Likewise, provisions providing that default to the ASP is a default to all ASP particiapting IATA carriers is reasonable. In that situation the default clearly represents collective risk to the group taking collective action.

IATA CARGO AGENCY PROGRAM

A. Background and History

Originally, both IATA cargo agents and IATA passenger agents were governed under a single agency program. It was not until 1961 that a separate IATA cargo agency program was developed. [353]

ATC has no domestic counterpart to the IATA cargo agency program. Nevertheless, the IATA cargo agency program has "piggybacked" on the passenger agency programs. When innovations or modifications in the cargo program have appeared and were applicable to passenger sales, they usually appeared in the passenger agency program first. For example, IATA recently developed a Cargo Accounts Settlement System (CASS) inspired by the ASP. [354] By the same token, the Board in reviewing the cargo agency agreements has generally applied the standards first developed in the passenger agency context. For example, in connection with its interim approval of the CASS program, the Board struck down the mandatory carrier participation rules. 355/

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[352] In Order 80-6-101, June 17, 1980, we prohibited automatic collective default based on a default to an individual carrier until after the travel agent commissioner had determined that such a default represented a hazard to all carriers' interests. Ultimately, ATC withdrew its provisions for conference-wide action. Order 80-6-101 at 4. See also, Order 79-8-134 at 6, August 24, 1979.

[353] IATA-T-1 at 4.

[354] See Orders 78-8-26, August 4, 1978 and 81-9-83, September 15, 1981.

In many ways, the IATA cargo and passenger agency programs are similar. The cargo agency program provides for exclusive use of IATA cargo agents. It establishes standards for personnel, finances and locations. It also provides for establishing the responsibilities of the cargo agents to carriers. The standards and other rules, however, are sometimes markedly different.

For personnel, the cargo agreement requires only that the agent (which can include a corporation) has been engaged in promotion and sale of international air cargo transportation for six months. 356/ There is no specific promotional experience requirement for owners or managers as individuals as there is for passenger agents. Similarly, there is nothing which corresponds to the one year technical ticketing experience requirement. Rather, there is a general requirement that the agent have personnel who are qualified to perform a variety of functions including quoting rates, accepting and delivering shipments to carriers, and collecting and remitting funds. 357/ The only technical requirement is that personnel be qualified to handle hazardous cargo under IATA's hazardous cargo regulations. 358/

In the area of financial standards, the cargo agency resolutions require only that the agent have a satisfactory credit and financial standing 359/ as opposed to the specific capitalization requirement in IATA's passenger agency program.

The locational requirements are also less detailed. The agent must have an office or a department in an office which is engaged primarily in the promotion and sale of cargo air transportation and handling consignments. In addition, the agent's facilities must be suitable for

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355/ Order 81-9-83 at 3-5.
356/ IATA Resolution 803 §A(1)(a).
357/ IATA Resolution 803 §A(2)(c)(::).
358/ IATA Resolution 803.A(2)(c)(v).
359/ IATA Resolution 803.A(1)(d).

performing the various services outlined above in connection with personnel, including the handling of hazardous cargo. 360/

The agreements also provide for the optional CASS settlement mechanism. Like the ASP, CASS provides for periodic submissions or unified sales reports and remittances from agents to CASS participating airlines.

As originally approved by the Board, the CASS agreements permitted IATA carriers not to use CASS, but an IATA carrier electing to use CASS was required to make all of its IATA agents use the system exclusively. In addition the Agency Resolution precluded non-CASS carriers from adopting more generous settlement terms than those provided for in CASS. While IATA was developing its experimental program the Board reconsidered its approval of these two provisions, and disapproved these provisions for the reason it used in the ASP participation case. 361/

There are two differences between CASS and the ASP worth noting. The first, which is a technical one, is that there is no equivalent to the standard agent's ticket, and airline validator plates. Rather, agents use carriers' individual airwaybills. 362/ The second is that CASS explicitly provides for participation by non-accredited businesses, including shippers. 363/

B. The Cargo Agency Industry Today

There were approximately 880 registered IATA agents in 1979. However, the actual number of outlets is closer to 6000 because, unlike IATA's passenger agency program, cargo agents are not required to register branch offices. 364/

In addition, the structure of the market for freight retailing services is markedly different. In the freight area, alternatives to agents have existed since at least the 1950's and they are much more important. Forwarders have been acting as indirect carriers, setting their own rates and performing pickup and delivery service and document preparation. In addition, the Board has permitted shippers to perform their own retailing services and receive direct or indirect compensation

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360/ IATA Resolution 811.A(2)(c)(v).
361/ Order 81-9-83, September 15, 1981.
362/ Lindsay (IATA) 88 Tr. 73-74.
363/ See Order 81-9-83 at 5.
364/ See Whalen (IATA) 89 Tr. 136.

from carriers. 365/ The Board authorized cooperative shippers associations in 1956. 366/ A cooperative shippers association is a group of shippers that pools its freight, performs other retail functions, such as paperwork or pick-up and delivery, and receives a discount based on the higher weight of the pooled traffic. More recently, the Board permitted shippers to receive fees from carriers for performing ready for carriage services. 367/ Currently, the Board is considering permitting direct carriers to pay fees to indirect carriers without regard to the nature of the services performed. 368/

In short, cargo agents are subjected to a wider range of competitive

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365/ When the Board discontinued forwarder registration in 1981 there were some 1500 forwarders and shipper cooperatives. EDR-421 at 2, March 31, 1981.

366/ ER-202, April 13, 1956, 21 FR 2511.

367/ 14 CFR 399.86, PS-86, 44 FR 45609, August 3, 1979.

368/ EDR-427, 46 FR 35665, July 10, 1981.

alternatives. 369/ These alternatives provide an effective disciplining force on IATA accredited cargo agents.

C. Exclusivity

The IATA cargo agency programs contain exclusivity provisions that essentially duplicate those that appear in its passenger agency programs. 370/ Judge Yoder concluded that the exclusivity provisions of the cargo agreements are a necessary, integral part of the system and that they enhance competition in the air cargo transportation marketing industry.

BDA and IAAA argue that the cargo agency exclusivity provisions should be disapproved. As with the passenger agency program, BDA believes the cargo program will attract participants on its own merits. They submit that the argument that its elimination will erode the benefits of common accreditation is based solely on the premise that carriers will act irrationally. Cargo agents and air freight forwarders provide slightly different services. It is desirable, however, to have both statuses while dealing with the public and air carriers. In BDA's view, the exclusivity provision makes it marginally more difficult to attain agency status. IAAA maintains it is a compensation fixing agreement, fixing compensation to unaccredited agents at zero. IAAA argues the Board has already found such commission fixing agreements to be illegal. 371/

IATA's cargo agreement analysis, like BDA's, essentially duplicates their passenger agreement analysis. It states that the major objective of the agreements is to establish vertical restraints on agents so that they may be commonly appointed by all carriers and become industry agents.

369/ The history of cargo agent commission levels may be indicative of theincreased competition that they face. At the time IATA went to open commissions, the fixed rate for passenger point-to-point sales was 7 percent, and the fixed rate for cargo was 5 percent. Since commissions were opened, the passenger rate has risen to 10 while the cargo rate has stayed at 5%. Blakely (IAAA) 13 Tr. 47.

370/ IATA Resolution 803 §D(1) and (3). They provide:

> (1) Nature of Remuneration and to Whom Payable:
>
> The Member may remunerate an Agent under appointment to sell and handle international air cargo transportation on its behalf....
>
> (3) Payment of Remuneration:
>
> The remuneration shall be payable only to agents appointed by the paying Member in accordance with Section B hereof.

371/ IAAA Brief to Board at 11.

These agents, it says, will competently serve the public and air carriers. IATA maintains that exclusivity helps secure the public benefits of the programs. Moreover, no one has been excluded from the relevant market, i.e., bundled cargo agency services. If a person is excluded, he can enter the industry through the alternative of air freight forwarding. Exclusivity, therefore, is a reasonable ancillary restraint.

Although the analysis we have applied to the exclusivity provisions of the passenger agency programs applies, to a great extent, to the exclusivity provisions of the cargo agency program, it is also clear that the exclusivity provisions have clearly been less effective in dampening competition in air cargo transportation distribution. There are more kinds of air cargo marketers than there are passenger service marketers. There are, of course, air carriers providing some services. Usually they merely accept and check freight prepared for transport, then load and transport it. Airlines provide some pickup and delivery services, or package service to the public. There are cargo agents and airfeight forwarders. Both perform essentially the same "ready for carriage" functions of accepting, weighing, packaging and documenting shipments. Both also consolidate shipments. The difference between the two is that the forwarder is also an indirect air carrier, and can therefore set his own rates. While agents rely on commissions as the means of compensation, forwarders rely on the price differentials between what they charge their customer and what they are charged on consolidated shipments to earn a profit. Nonetheless, forwarder status constitutes a readily available alternative to agency status. In addition to cargo agents and forwarders, cargo general sales agents and shipper cooperatives are free to perform the same services. 372/

We conclude, however, that the exclusivity provisions should be disapproved. As with the passenger agency exclusivity provisions, they were adopted with the view of denying participants in the conferences the use of alternate marketers. Moreover, we cannot conclude that other forms of cargo distribution would not have entered the marketplace if the exclusivity provisions had not been in place.

D. Accreditation Standards

No party has attacked the individual accreditation standards of the IATA cargo agency program. The standards for premises, competency and integrity do not appear excessive and are generally necessary in order to induce air carriers to participate in the common accreditation program. Moreover, it should be noted that the cargo agency standards are, in most respects, less restrictive than their passenger agency counterparts.

The IATA location requirements provide that an agent must operate at least one administrative or sales office in the country where he seeks approval and provide all services and handling functions necessary for

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372/ This adds further support to our conclusion above that passenger agency exclusivity is not necessary to preserve the agency programs.

proper processing of shippers' air cargo. 373/ IATA's competency standard for cargo agents requires that a person must have been actively engaged in the promotion and sale of international air cargo transportation and have provided services in the cargo industry for at least six months prior to the date of application. 374/ The applicant must also have a satisfactory financial and credit standing. 375/

We have expressed doubts about promotion requirements in the context of the passenger agency programs. We have no evidence, however, on how this standard is applied and no party has objected to its inclusion in the standards. We will therefore adopt Judge Yoder's conclusion that these provisions are reasonable and do not substantially restrain competition.

Judge Yoder also concluded that the cargo equivalent of the 20% rule should be approved. It provides that a company cannot do "substantial" business with itself or any affiliate. 376/ He reasoned that it is necessary to insure that persons become agents to promote and sell to the general public and to discourage customers from becoming agents for the purpose of obtaining rebates in contravention of section 403 of the Act.

We have decided to approve the provision despite its effect on competition until December 31, 1984. Although we have interpreted section 403 to permit users of the international air freight system to request and receive compensation for services performed, 377/ such that commissions to persons providing services to air carriers would not then constitute a rebate, that policy has not been in effect for a significant period of time. We believe we should afford the air cargo distribution industry more time to adjust to our new policies. We conclude, therefore, as we did in our discussion of the similar provisions in the passenger agreements, that the rule should be retained for a transitionary period.

373/ IATA Resolution 803 USA §A(2)(e); 86 Tr. 18-19 and 103.
374/ IATA Resolution 803 USA §A(1)(a); 86 Tr. 18, 85.
375/ IATA Resolution 803 USA §A(1);(d). Ruggiero (IATA) 86 Tr.104. Apparently, IATA interprets its resolution requiring "satisfactory" financial and credit standing to mean that an applicant must have a $20,000 equitable interest in a corporate agency, or $15,000 in working capital in the case of a non-corporate one. Ruggiero (IATA) 86 Tr. 104.
376/ Resolution 803 §A(3)(b) and (3)(c).
377/ 14 CFR §399.86, PS-86, 44 FR 45609, August 3, 1979.

E. Miscellaneous Provisions

Judge Yoder recommended several changes in the cargo agency programs. Most of them are not challenged by any party. We have examined his analysis and we believe it is consistent with the requirements of the Act. We will therefore adopt his conclusions on those issues. They are as follows:

1. Removing restraints on agency compensation; I.D. at 190-191.
2. Authorizing commissions for agency applicants; I.D. at 192-193. But we will not require the amendment to those provisions.
3. Removing restraints on consideration of subsequent applications; I.D. at 192. However, we will not require that the rules be clarified.
4. Approving changes in descriptive terminology; I.D. at 193-194. We will not, however, require ment these changes be made.
5. Eliminating automatic default procedures; I.D. at 195.
6. Allowing individual settlement of airline claims; I.D. at 195.
7. Modifying agents' sole liability; I.D. at 195-196.
8. Dismissing the Cargo Accounts Settlement System-Collect; I.D. at 204-207.

A number of issues remain, however.

1. Cargo General Sales Agents

For the reasons set out in our discussion of the passenger GSA agreements, 378/ we will disapprove the territorial limitations of the cargo GSA agreements. Those provisions do not result in efficiency gains of any kind and are not supported by legitimate air carrier objectives.

2. Collective Default Action

IATA rules require collective default action against a registered cargo agent whenever an agent using individual traffic documents defaults

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378/ See page 96-97, supra.

to a single carrier. [379] Judge Yoder would apply these provisions only after the IATA administrators had determined that "no bona fide commercial dispute" existed. BDA and IAAA maintain that the Board should prevent use of conference power to resolve individual carrier disputes. BDA would require that IATA rescind non-CASS rules or provide for impartial review of the dispute before conference action is taken. IAAA would prefer that the present essentially bilateral method of settling disputes be continued.

IATA responds that an initial default is fairly indicative of an agent's financial weakness. Moreover, it says, no action is taken until it is established that a default has occurred.

We rejected the argument that defaults to individual carriers are indicative of an agent's financial weakness such that conference intervention is warranted in the ATC passenger agency agreement context. [380] Our rationale is no less pertinent here. Agents may have legitimate disputes with airlines that must be resolved between them and not through the additional pressures the conferences may bring to bear.

While we are disapproving the provisions listed above, we wish to make it clear that our concerns are very limited. One way of eliminating these concerns has already been suggested. For example, IATA may adopt rules requiring a review of any dispute by a neutral adjudicator prior to such action. While we recommend IATA take action to insure that a dispute is legitimate, we will not require them to do so.

The Cargo Agents Settlement System (CASS) is a settlement clearinghouse patterned after the Area Settlement Plan. Like the ASP, CASS provides for uniform reporting and remitting cycles. Documents are to be centrally processed, with reports of transactions and liabilities prepared for participating carriers and agents. In order to facilitate centralized processing, IATA is apparently attempting to devise a standard airwaybill that may be issued by machines.

CASS is a relatively new program. Although it was approved in August 1978, [381] IATA did not begin implementation at that time, particularly because IATA agent participation was mandatory. After receiving protests from IAAA, the Board granted their request for reconsideration of its approval of CASS and withdrew its approval of mandatory participation provisions. [382]

IATA makes essentially the same arguments in support of CASS as ATC made in support of the ASP. It argues that the automated procedures of CASS will generate substantial cost savings. It states that CASS will eliminate backroom accounting operations, resulting in faster processing and compensation. In addition, CASS lays the necessary groundwork for standardized airwaybills, so they can be machine generated. IATA adds that CASS has been highly successful since its implementation last year, even though only volunteers have participated because of the Board's decisions.

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[379] IATA Resolution 803, §§G(2)(c), (d), (6), (9); 821 §18(c); 823 §3(c).
[380] Orders 79-9-134 and 80-6-101.
[381] Order 78-8-25, August 24, 1978.
[382] Orders 81-6-175, 81-9-83 and 81-12-121.

The major controversy surrounding the CASS program involves whether participation in the program should be mandatory for IATA agents.

IATA asks the Board to approve provisions requiring mandatory participation by IATA cargo agents. It states that mandatory participation is interrelated with uniform remitting. The provisions, taken together, generate the efficiencies of the program. Competition is not affected because the funds agents hold in trust have no value to the agent while they are in his hands. In short, IATA believes a mandatory CASS only "mechanizes" and centralizes reporting and remitting of funds held in trust by the cargo agent for its carrier principals.

IATA indicates that the concerns the Board expressed in Order 81-9-83 have been addressed in the record. Carriers want full agency participation in CASS to obtain maximum efficiencies. IATA asserts that the record demonstrates there will be no harm to agents: they will benefit from CASS's efficiencies, get their remuneration earlier, and CASS will not interfere with current methods of reporting.

Judge Yoder concluded cargo agent participation in CASS should be discretionary, ruling against IATA's position that it should be made mandatory for all a carrier's agents once the carrier chooses to participate in the program.

We will adopt Judge Yoder's conclusions with respect to the CASS agreements. The grounds IATA offers in support of a mandatory CASS are essentially the same as those we rejected when we disapproved mandatory IATA participation in the ASP. 384/ Similarly, we adopt his recommendation that we disapprove provisions precluding settlement outside CASS on less frequent settlement schedules.

With these changes, we conclude that the cargo agency agreements at issue do not substantially restrict competition and they are approved.

ANTITRUST IMMUNITY

The final question we have to consider is whether to confer antitrust immunity on the agreements we have approved.

A. Section 414

Section 414 sets out two circumstances in which antitrust immunity may

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383/ Order 80-1-74, January 14, 1980.
384/ I.D. at 203-04.

or must be granted. [385] First, §414 gives the Board the discretion to grant antitrust immunity to an agreement to the extent necessary to allow the transaction to go forward if it determines that an exemption is required in the public interest. Second, the Board must grant antitrust immunity if an anticompetitive agreement is approved because of public benefits that cannot be obtained by less anticompetitive alternatives. Antitrust immunity must be granted to the extent necessary to allow it to go forward. Everyone acknowledges that it is now well established in Board precedent that there are two tests for conferral of antitrust immunity, one discretionary, one mandatory. [386]

With his proposed modifications, Judge Yoder concluded that the agreements at issue would not substantially lessen competition. The provisions of section 414 of the Federal Aviation Act that would make the grant of antitrust immunity mandatory would therefore not apply. However, he concluded that antitrust immunity should be granted in the public interest. He cited cases where the Board has granted immunity in circumstances where carriers would not participate in programs without it. In this case he concluded the threat to implementation of the agreements was no less severe. He noted that the Board has found the agreements appear to be anticompetitive. Consequently, he recommends that immunity be granted in order to avoid any threat to the benefits of the programs.

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[385] "In any order made under section 408, 409, or 412 of this Act, the Board may, as part of such order, exempt any person affected by such order from the operations of the "anti-trust laws" set forth in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12) to the extent necessary to enable such person to proceed with the transaction specifically approved by the Board in such order and those transactions necessarily contemplated by such order, except that the Board may not exempt such person unless it determines that such exemption is required in the public interest. Notwithstanding the preceding sentence, on the basis of the findings required in subsection (a)(2)(A)(i) of section 412, the Board shall, as part of any order under such section which approves any contract, agreement, or request or any modification of cancellation thereof, exempt any person affected by such order from the operations of the 'antitrust laws' set forth in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12) to the extent necessary to enable such person to proceed with the transaction specifically approved by the Board in such order and with those transactions necessarily contemplated by such order."

[386] However, ASTA, ATC and IATA allege that the antitrust immunity must be granted if an agreement is attacked as anticompetitive, as opposed to being found to be anticompetitive.

3. Our Conclusions

Except with respect to the interline exclusivity and 3TD rules, which we have found to be anticompetitive but to merit approval under the savings clause, we have concluded that the agreements do not substantially reduce competition. Accordingly, the grant of antitrust immunity is discretionary as to the remainder of the agreements. We discuss the ramifications of our approval of the particular anticompetitive provisions in our discussion of mandatory immunity.

We have decided to grant antitrust immunity as a transitional measure for approximately 2 years until December 31, 1984 to the various ATC and IATA programs approved in this opinion. Our basic policy is that exposure to antitrust litigation is consistent with reliance on competition, and that the grant of antitrust immunity represents a decision that competition will fail. These considerations cause us to apply very stringent standards for the grant of antitrust immunity on an indefinite basis. Nevertheless, we have recognized that the grant of immunity for a limited period of time is required by the public interest to permit a smooth transition to a fully competitive environment.

In the context of other section 412 agreements, we have recognized that an abrupt shift from a protected regime to one of full exposure to antitrust liability may cause parties to withdraw. Although this has never prompted us to give indefinite antitrust immunity, we have found the public interest to require transitional immunity where the agreement provided recognizable public benefits, and where we concluded that changes in the agreement might be required to permit it to withstand antitrust scrutiny. 387/

These considerations apply with equal force to the ATC and IATA passenger agency programs. The benefits in terms of lowering carrier marketing costs and increasing consumer access to air transportation and the full array of competitive alternatives have been well documented.

We have found, as we did in the Allegheny commuter cases that the concept of common accreditation is not inherently anticompetitive, and that

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387/ See, e.g., Allegheny Airlines, Inc. Commuter Replacement Agreements, Orders 79-2-108, February 15, 1979, and 79-3-166, March 26, 1979, in which the Board conferred antitrust immunity for a transitional period to Allegheny Commuter franchise agreements. The Board concluded that since franchise agreements were not inherently anticompetitive, there was no need to be concerned about eventual removal of immunity but it concluded that "...a limited exemption to permit Allegheny time to analyze its existing agreements and bring any offensive terms or conduct back within the accepted limits of franchising activity is equally consistent with the statutory concern for small communities." Order 79-2-106 at 15. Maintenance of small community service was the specific public benefit with which the Board was concerned.

a properly framed agreement would pass muster under the antitrust laws. Under these circumstances, we are not concerned that eventual exposure to antitrust challenge will cause the programs to collapse.

Our decision disapproves, in a two step process, the most anticompetitive provisions of the ATC and IATA passenger programs, *i.e.*, the exclusivity provisions. However, other provisions, such as the experience requirements, may go farther than are necessary to meet their legitimate purposes. We have concluded that as a matter of policy it is more appropriate for carriers to work out alternative provisions than to have us dictate changes. The short term risks of antitrust prosecution might make some carriers reluctant to participate while this process is going on.

The various agency programs at issue here are much more complex than the Allegheny commuter agreements to which we have applied a transitional immunity policy in the past. Moreover, carriers have operated under the existing system for almost 40 years. Immediate withdrawal of antitrust immunity could disrupt the orderly transition period we conclude best serves the public interest.

In addition, we have decided to permit the carriers to maintain a limited form of exclusivity for interline ticketing as a transitional measure. To provide the participants a period of adjustment, we find that antitrust immunity is required in the public interest until December 31, 1984 for the ATC and IATA programs at issue in this proceeding. An indefinite grant of antitrust immunity would not, however, be required by the public interest.

The power to confer antitrust immunity is a regulatory power: it is given where competition has been supplanted by active regulation by an administrative agency. [388] Regulation is imposed upon an industry when Congress determines that the normal operation of the competitive process will not serve the public because the industry is a natural monopoly or there is a defect in the market structure that will prevent it from operating competitively. Antitrust immunity is conferred because conduct, which in other industries would be considered to be abuses of competitive processes, may be in the public interest in a regulated industry. 389/

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[388] See *FCC v. RCA Communications, Inc.*, 346 US 86 (1953).

In terms of policy, we have recognized that full antitrust exposure is consistent with deregulation. 390/ Other entities pursue cooperative activities but they do so with a careful regard not to restrict competition unreasonably. Government intervention in the form of agreement approval and immunity is supplemented by a general rule of competition. Courts intervene only when there is a dispute.

We have previously rejected arguments that immunity must be granted because of the fear of unwarranted law suits on the grounds that such exposure is a normal facet of doing business in a non-regulated market. 391/

Consequently, the Board has set a high standard for granting antitrust immunity. Antitrust immunity will not be granted unless an applicant makes a strong showing of two predicates: first, that immunity is required by the public interest, and second that the transaction will not go forward without that immunity. 392/

Applying that policy to this case, antitrust immunity would not be granted. The public interest arguments that have been raised are founded on the view that carriers will abandon the ATC and IATA systems because of the fear and cost of lawsuits. Their argument makes sense only if we approve the current system without much change, as Judge Yoder did. But if the handful of provisions with significant anticompetitive effects are disapproved, the common accreditation system and the ASP would not be subject to serious challenge under the antitrust laws. Carriers will not abandon the substantial benefits of common accreditation to avoid the comparatively small costs of defending it against frivolous attacks.

389/ As a practical matter, once an agreement receives approval and immunity, we are obligated legally to carefully scrutinize every change and every complaint about how the program is administered. This will be so even when exclusivity and other anticompetitive provisions are eliminated. The record is seldom as complete as necessary to regulate well. ATC or IATA provide relatively short justifications. Unless some existing group's interests are directly affected, there may be no objections. If there are objections, they are likely to be self-interested. While we and our staff can certainly do our best in analyzing the agreements, the truth is that the real world effects may not be readily apparent, and there is often an insufficient factual basis to decide whether a provision is likely to unjustifiably inhibit competition.

390/ *Allegheny Commuter Agreements*, Order 79-2-108 at 5, *North Central-Southern Merger*, Order 79-6-7/8 at 8 and *TXI-Pan Am-National Acquisition*, Order 79-12-163/164/165 at 75.

391/ *Allegheny Commuter Agreements*, Order 79-2-108 at 15, *UATP*, Order 80-6-66 at 33 and *Air Cargo, Inc. Show Cause*, Order 82-5-106 at 7-8.

392/ *TXI-Pan Am-National Acquisition*, Order 79-12-163/164/165 at 75.

We cannot give complete assurance that there would be no remaining provision that some court somewhere might not find to be anticompetitive. Whether there is an anticompetitive effect often depends upon how an agreement is implemented. But carriers, both foreign and domestic, are now liable under the antitrust laws for actions that a court determines are outside the scope of the antitrust immunity granted by the Board. [393] The only area of protection is for the terms of the agreement. Even then, courts are reluctant to extend the reach of immunity beyond what is absolutely authorized by the Board. This means that carriers are currently subject to antitrust lawsuits, whether frivolous or not. Exposure to antitrust liability in other sectors of our economy is recognized as an important deterrent to anticompetitive behavior.

Finally, continued immunity for the ATC/IATA accreditation systems would inhibit our long-term goal of introducing more competition into the distribution system. Immunity maintains an artificial disincentive to the development of alternatives since carrier risks are greater if they move outside the immunized activity. Airlines have become accustomed to the security of immunity and may initially feel uncomfortable about losing it. Moreover, continued antitrust immunity would require the Board and its successor agency to continue its role as antitrust policeman. With immunity, carriers would continue to seek Board approval and immunity of modifications to agreements. It is often difficult to predict the competitive effects of an agreement which has not yet been implemented and we have no assurance that we could always do so accurately. Without immunity carriers will be their own policeman. While the threat of antitrust litigation will not cause them to abandon the programm, it will provide strong incentives for them to tailor their agreements to assure that they involve no unnecessary risk. [394]

We are therefore not convinced that indefinite antitrust immunity for the agreements is required in the public interest. Long term elimination of antitrust immunity would be most consistent with our fundamental decision in this case, *i.e.*, that aside from disapproving exclusivity in order to permit competitive alternatives to arise, any further actions to increase competition should be developed by the carriers themselves.

As has always been the case, parties are free to request reconsideration of the ultimate withdrawal of antitrust immunity at any time. We would caution parties, however, that consistent with past decisions, we would not expect to reconsider the immunity issue unless parties demonstrate materially changed circumstances or an important need strongly suggesting that the continuation of immunity should be considered. [395] Of course, we have the authority to reconsider the immunity question based on changed circumstances on our own motion.

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[393] *Lowe v. Int'l Air Transport Ass'n*, 1975-2 Trade Cases ¶60,668 (S.D.N.Y. 1976).

[394] It has been suggested that the threat of antitrust litigation may cause carriers to forego improvements to the program which raise close competitive questions. To some extent this can be alleviated by use of Department of Justice business review letters through which carriers can request advisory opinions on whether a particular practice would violate the antitrust laws. *See*, 28 C.F.R. §50.6. The Department of Justice's position before the Board is also indicative of the practices it would likely challenge.

C. Parties' Arguments--Mandatory Immunity

ATC, ASTA and IATA argue that immunity is mandatory whenever an agreement is challenged as anticompetitive and proponents defend it under the savings clause. In support of this position, they rely on the language of section 414. [396] Proponents argue that they must, in section 412 proceedings, present an affirmative showing under the savings clause whenever an agreement is challenged as anticompetitive. Having done so, as they did in this case, they are entitled to immunity. [397]

This interpretation distorts the clear intent of Congress in revising sections 412 and 414 in 1978 and, later, in 1979. In passing the Airline Deregulation Act, Congress intended to limit the circumstances in which antitrust immunity was granted to those where we found it was necessary in order for a transaction to go forward or was otherwise required by the public interest. [398] The subsequent amendment only clarified Congress' intention that transactions that are anticompetitive, but provide important public benefits and transportation needs, are in the public interest and must be granted antitrust immunity to the extent necessary to allow the transaction to go forward. 399/

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[395] Universal Air Travel Plan, Order 80-6-66 at 34.

[396] They cite language of section 414 amended by the IATCA legislation provides that "...on the basis of findings required by subsection (a)(2)(A)(i) of section 412, the Board shall, as part of any order which approved any contract agreement or request, or any modification or cancellation thereof exempt any person affect by such order from the operations of the antitrust laws to the extent necessary to enable such person to proceed with the transaction specifically approved by the Board in such order and with those transactions necessarily contemplated by such order."

[397] They rely on language in the legislative history of IATCA to the effect that:

> "when the Board approves an agreement under the modified Bank Merger Act test the Board shall grant an exemption from the antitrust laws for actions necessary to carry out the approved agreement."

H.R. Rep. 96-602, 96th Cong. 1st Sess. (November 8, 1979) at 8. *See also* H.R. Rep. 96-7161, 96th Cong. 1st Sess. December 19, 1979), at 73.

[398] H.R. 95-1779 at 78, October 12, 1978.

If we were to adopt the interpretation ATC, ASTA and IATA propose, our discretion in granting immunity would be severely curtailed. Parties will characterize procompetitive effects as "public benefits" as they have here. While we have considered these arguments in our competitive analysis we have determined that the other asserted transportation benefits that would not be recognized under the antitrust laws do not justify approval of the agreements. The mere fact that parties have produced evidence under the savings clause should not result in mandatory immunity. This would produce the anomalous result that agreements that pass muster under the antitrust laws and whose public benefits might never have been considered by the Board must be granted antitrust immunity.

Proponents also argue that we do not have the discretion to disapprove particular provisions of the agreements under the anticompetitive clause of section 412. According to the proponents of mandatory immunity, we cannot disapprove anticompetitive provisions in order to avoid conferring automatic immunity.

As discussed earlier, this view of our powers under section 412 is incorrect. We have long considered ourselves to have the power to conditionally approve agreements under the standards of section 412, including the power to limit the applicability of approved provisions to certain transactions. 400/ This view has been sustained by the courts. 401/ Nothing in the ADA amendments to section 412 or their legislative history suggests that the addition of the new competitive standards to section 412 precludes us from using this power to require

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399/ "Under existing law (Section 414) the Board needs to make a separate public interest finding in order to immunize an agreement approved under the Bank Merger Act test from the antitrust laws. The committee does not see a need for this separate finding in which the *Board has determined that the agreement should be approved even though it violates the antitrust laws.* Accordingly section 26 amends section 414 of the Act to provide that when the Board approves an agreement under the modified Bank Merger Act Test, the Board shall grant an exemption from the antitrust laws..." H.R. Rep. No. 96-602, 96th Cong., 1st Sess. (Nov. 8, 1979) at 8. (emphasis added). We note that the Initial Decision in this case may have given the wrong impression about the circumstances in which antitrust immunity is granted. Prior to the ADA, antitrust immunity was automatically granted to an agreement approved under section 412,, which made the filing of any carrier agreement mandatory. The language quoted at page 29 of the I.D. refers only to Board practice after 1978 and prior to the amendments made by the International Air Transportation Competition Act of 1979.

400/ *See e.g., Popular Latin Travel Agency*, Orders 78-10-31, October 5, 1978 and 79-8-134, August 24, 1979. ATC conference default procedures cannot be applied to a dispute with a single carrier unless an independent finding is made that such a dispute presents a risk to all conference members.

401/ *McManus v. CAB*, 286 F.2d 414 (2d Cir. 1961).

deletion of provisions inconsistent with those standards. Indeed, the requirement that we consider less anticompetitive alternatives compels the opposite conclusion.

The justification for our ability to conditionally approve agreements under the competitive test is simple. It avoids unnecessary and wasteful disapproval of entire agreements which are fundamentally sound, but have a few particular offensive provisions. Carrier resources are saved because they do not have to go through the expense of drafting a whole new agreement, and Board resources are saved because it does not have to review that agreement.

This argument, however raises another issue with respect to the grant of antitrust immunity. Having identified specific provisions of agreements as restraints on competition and approved them under the savings clause, the issue arises as to whether the mandatory immunity provisions of section 414 apply only to those provisions, or to the entire agreement containing those provisions.

In amending section 412 in 1978, to give the Board discretion to exempt persons from the antitrust laws, Congress provided specifically that the exemption could be given only "...to the extent necessary to enable such person to proceed with the transaction approved by the Board... and those transactions necessarily contemplated in such [approval]". 402/ The legislative history of this provision indicates a clear Congressional concern that the previous provisions of section 414 resulted in much broader immunity than appeared necessary to accomplish its purpose, 403/ and that the Board, therefore, should have some ability to limit its scope. 404/ The ability to limit and tailor antitrust immunity only to provide that which is necessary must reasonably include the ability to immunize portions of an agreement. If this were not the case, the policy justification for discretionary immunity, that exposure to antitrust laws is consistent with reliance on actual and potential competition, could be thwarted.

The 1979 amendments were a procedural change, eliminating the need to make what Congress considered to be a redundant showing that immunity was required in the public interest after the Board had already concluded that approval of an anticompetitive agreement was required to secure serious transportation needs or important public benefits. 405/ Moreover, Congress explicitly provided that the mandatory immunity was to be provided only to

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402/ P.L. 95-504, §30, 92 Stat. 1731 §30.

403/ S. Rep. 95-631, 95th Cong. 2nd Sess. (Feb. 6, 1978) at 84-85., H.R. Rep. 95-1217 95th Cong. 2nd Sess (May 19, 1978) at 18.

404/ "...the Board will be allowed to...refrain from granting antitrust immunity on any or all aspects of the transaction [approved by the Board]." S.Rep. 95-504, at 15; "immunity shall be granted only insofar as is necessary to completion of transactions approved by the Board...the grant of antitttrust immunity is discretionary with the Board..." H.R.Rep. 95-1211, at 28.

405/ *See* pages 126-27, *supra*.

the extent necessary to enable a transaction to go forward. If grant of immunity to a portion of an agreement is all that is necessary to permit a transaction to go forward, there is no logical reason to extend the grant of immunity further.

On the basis of these considerations, we conclude that we are required to give antitrust immunity only to the exclusivity and BTD rules for the duration of their approval. Even if immunity were required to be given to the whole of the agreements as a result of our approval of the exclusivity and BTD provisions, the outcome of this case would not be different. As a matter of discretion, we have decided to confer antitrust immunity on the whole of the agreements for a period coextensive with our approval of these provisions. After December 31, 1984, these provisions will no longer be approved. The grant of mandatory immunity by operation of law will cease for those aspects of the agreements that we have found may substantially reduce competition. We will have full discretion to withhold immunity from the agreements which will remain approved after that date because our approval is based on the finding that the remainder of the agreements do not substantially reduce copetition.

We turn now to parties' arguments concerning discretionary immunity. Given our decision to grant transitional immunity, we consider them in the context of whether antitrust immunity is required in the public interest, after a transition period, when the agreements which are still approved will not be anticompetitive and we will have full discretion to grant or withhold immunity.

E. Parties' Arguments--Discretionary Immunity

At the outset, we reiterate our conclusions that our past decisions have emphasized that the grant of antitrust immunity is extraordinary relief, rather than a routine occurrence. In enacting the ADA, Congress directed that control of the air transportation system be returned to the marketplace. We have consistently held that a part of the return to market control is exposure of participants to the antitrust laws, as that exposure exists in unregulated industries. 406/

Parties have argued that grant of antitrust immunity is not necessarily inconsistent with competition. They point out that before immunity is conferred, an agreement must be submitted to the Board and tested under a competitive standard. In addition, once an agreement is approved, parties do not have wide discretion in their activity. Courts will not recognize immunity for practices that do not conform to the terms of the Board's approval. 407/

406/ UATP, Order 80-6-66 at 33 and the cases cited therein.

407/ Citing Lowe v. Int'l. Air Transport Ass'n, 1975-2 Trade Cases ¶60,668 (S.D.N.Y. 1976) and Grueninger Int'l. Travel, Inc. v. Air Transport Ass'n. of America, 551 F.2d 1324, 1326 (D.C. Cir. 1977).

We agree that conferral of immunity does not give carriers free rein to restrict competition. However, exposure to antitrust laws is most consistent with an industry controlled by competition. The approval-immunity system under sections 412 and 414 is an inherently different system for controlling carrier behavior than the system of competition and exposure to antitrust laws. Under the first, the government is still the ultimate arbiter of the public interest. In the latter, carrier managements weigh their interests and those of parties who will be affected by an agreement, subject only to the requirement that their agreements do not unreasonably restrain competition.

Exposure to antitrust liability will also make enforcement of the policy of section 412 that intercarrier agreements not unreasonably restrain competition more efficient. Without antitrust immunity, this policy will be largely self-enforced by the carriers.

Finally, immunizing the agency agreements will reduce the efficacy of our decision which is to encourage competition in distribution by disapproving provisions of the existing programs which serve only to protect it from competition from outside. The perpetual immunization of the programs from the accepted rules of competitive behavior would give the present accreditation programs an unwarranted advantage over any alternate distribution mechanism which does not have the protection of immunity.

Given these considerations, we would consider conferring antitrust immunity on an indefinite basis only if we were fairly certain that failure to do so would cause the programs harm. That case has not been demonstrated on the record.

1. Carriers will not withdraw because of the potential cost of antitrust litigation

Parties argue that exposure to antitrust litigation will add significantly to the cost of the system in two ways. First, the costs of litigation are potentially enormous and secondly the potential liability, both civil and criminal, is likewise potentially large. These potential costs will, it is argued, drive carriers out of the system.

The record does not support this prediction. When asked if ending immunity would lead to their withdrawal, only one carrier was willing to predict that it would. At most, they could only predict that withdrawal of immunity would require them to reevaluate participation. 408/

The benefits of the common accreditation program justify continued participation by most carriers even in the face of antitrust risk. Since passage of the ADA, we have withdrawn immunity from the UATP credit

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408/ Costello (Republic), 20.A. Tr. at 86; Carter (USAir) 20.A. Tr. at 94, 95; Reynolds (Eastern) 20.A. Tr. at 102; Clark (British Airways) 0.A. Tr. Vol. 2 at 106. The one exception was Simpson (Air California) 0.A. Tr. Vol. 2 at 98.

card [409] a joint venture for cargo pick-up and delivery in the U.S. [410] and a joint venture for consolidated publishing of information on scheduled air tours (combinations of air fare and ground packages put together by independent businesses and sold by them or through travel agents). [411] In each case, the programs continued to function. [412] The Airline Clearinghouse--the mechanism by which accounts between airlines are settled and which closely parallels the ASP--has been functioning for almost 40 years without antitrust immunity. [413] Similarly, airline agreements establishing an information pool on available spare parts has operated without immunity since its inception. 414/ Finally, the experience in unregulated industries confirms that a joint venture which produces real benefits will induce participation notwithstanding antitrust risk. Thus real estate listings services continue to operate despite the fact that some have been challenged under the antitrust laws. 415/

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[409] Order 80-6-66.

[410] *Air Cargo Inc.*, Orders 81-11-121, November 19, 1981 and 82-5-106 at 6-7.

[411] *Consolidated Air Tour Manual*, Order 80-6-39, June 6, 1980.

[412] *See* Costello (Republic) 2 O.A. Tr. at 90-91. Ruden (ASTA) 2 O.A. Tr. at 122. However, there were changes. For example, CATM was ultimately sold to an independent third party, but it continues to function. Costello (Republic) 2 O.A. Transcript at 91.

[413] By Order 2829, May 1, 1944, the Board disclaimed jurisdiction over the ATC Airline Clearinghouse.

In this regard, the agreements before us are distinguishable from the instances cited by proponents of immunity and relied on by the ALJ in which we granted antitrust immunity for discussion authority. In those cases, we were authorizing short-term discussion authority to carriers to allow them to address the emergency situations created by the PATCO job action. Because of the urgency created by the PATCO strike, immediate action on the carriers' part was necessary. Under these circumstances risk of antitrust litigation, even though we had found the discussions not to have been anticompetitive, might have caused carriers not to participate.

In contrast, this case involves agreements whose benefits are known to carriers and have been demonstrated on the record. If the benefits of a program are uncertain, risks such as antitrust attack may make carriers less willing to participate. But when the basic efficiencies are obvious, it is difficult to believe that carriers will leave a program rather than make the modifications necessary to reduce potential antitrust liability. By providing for transitional immunity we have given the carriers an opportunity to do just that.

Another factor that must be considered in granting antitrust immunity is the duration of time for which an exemption is requested and the activities that are contemplated. For example, in the cases cited by ASTA, IATA and ACT, the effects of the antitrust immunity were short-lived. The authorizations lasted for only 60 days and any agreements reached in the discussions were required to be submitted for Board approval. The Board could easily monitor and correct any problems created by the departure from the Board's policy that exposure to antitrust laws is a part of a competitive system. The impact of indefinite antitrust immunity is much harder to predict, and would require much greater vigilance on the part of the Board.

414/ See Motion to file an Unauthorized Document of the Airline Services Association, filed in Docket 40860, September 30, 1982.

415/ In the Washington, D.C. area, for example, both the Montgomery and Prince George's County, Maryland Board of Realtors operate multiple listing services based on 1980 C&P Telephone Co. Yellow Pages listings.

2. Threat of Antitrust Litigation

The ALJ found that the threat of antitrust litigation was substantial. He relied on the position taken by DOJ at trial that even with the elimination of exclusivity, the agreements were so anticompetitive as to require disapproval in their entirety, and he relied on the fact that opponents of antitrust immunity assumed exclusivity would in fact be disapproved.

DOJ's position before the ALJ, was based upon the view that, with only disapproval of exclusivity provisions, the passenger agreements would not be subject to significant competition within the near future. In its view, the benefits of participation in the programs are so substantial, both to air carriers and participants, that the programs would remain in place for some time to come. [416] Rather than revise individual standards, it proposed to disapprove the program in order to allow one that placed the least possible restraints on competition to arise. Now it has identified the restraints on competition that should be eliminated. With those disapprovals it maintains, and we agree, that the agreements would not be attacked by the Department under the antitrust laws. Although we have not immediately disapproved all of the restraints identified by DOJ, the most serious will be disapproved after December 31, 1984. In the interim, carriers will have protection from antitrust attack. [417]

Approval of the basic programs does not mean that all risk of antitrust lawsuits is precluded. Carriers and travel agents may be liable for actions that fall outside of the legitimate areas of cooperation or for administration of the progams in a way that was not contemplated under the agreements we have reviewed. However, immunity does not now extend to anticompetitive conduct that is outside of the scope of our approvals. [418]

This leaves only the threat of frivolous or nuisance litigation. Proponents argue that frivolous lawsuits have arisen fairly routinely with immunity in place. [419] Proponents of immunity argue that if immunity were lifted such litigation might increase dramatically. According to proponents, even frivolous lawsuits have costs, either in direct litigation costs or in payment of nuisance value settlements. They suggest that these costs could be of such magnitude that carriers would withdraw. [420]

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[416] Brief to ALJ at 30-40.

[417] Moreover, DOJ has indicated that although it might appeal the Board's decision it would not litigate these issues in a separate antitrust suit. Retchin (DOJ) 20.A. Tr. at 73, 74, 152. The concerns of other parties who have litigated issues in this case have been largely met by our immediate disapprovals or those that will take effect at the end of the transition period.

[418] See page 46 n.158, supra.

[419] See I.D. at 210

[420] A related problem is alleged to be equally serious. The threat of individual personal liability if immunity is withdrawn may make it impossible to hire staff to administer the program.

Of course, precise prediction of what will happen if immunity is removed is impossible and at best we can only make a reasoned assessment. We conclude that exposure to nuisance suits will not cause the programs harm. As a general matter, we observe that the various programs in the air transportation industry and other industries have survived without antitrust protection even though cooperative activities are exposed to nuisance suits as well as meritorious ones. Secondly, antitrust immunity has not fully protected these programs from nuisance suits in the past and carriers have found means to cope with this problem.

Frivolous complaints do not survive the summary judgment process and do not demand batteries of lawyers. Indeed, these costs may not greatly exceed the costs of dealing with a regulatory agency. Airlines are already subject to the antitrust laws in other areas and are prepared to deal with this issue. 421/

3. Immunity is not required to give the Board's decision res judicata effect

Proponents of immunity argue that the Board's decision is not binding on the courts. Absent antitrust immunity, a court would be free if a case were brought to require full litigation of all antitrust issues decided here. They maintain that equity dictates that, having expended three years and substantial resources litigating the case, parties are entitled to antitrust peace. Since the Board's conclusions are not otherwise binding, they contend that res judicata effect can be given only through the grant of immunity. They also argue that the risk of conflicting judicial decisions is inconsistent with the Congressional decision giving independent agencies plenary jurisdiction over the various national transportation systems. 422/

Congress has provided an explicit standard for the grant of antitrust immunity, i.e., that it is required in the public interest. Public interest considerations are clearly spelled out in the Act with great emphasis on fostering competition. We have discussed our reasons for

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421/ See e.g., *Airline Executive*, October 1982, *USAir: Colodny's Profit Guidelines*, p. 29.

422/ Parties rely on *Texas and Pacific Railway Co. v. Abiline Cotton Oil Co.*, 204 US 426 (1907); *Far Eastern Conference v. United States*, 243 U.S. 570 (1952).

concluding that exposure to antitrust litigation will not harm the programs.

The argument that Congress did not intend to subject carrier agreements to potentially conflicting court decisions is not consistent with the ADA amendments to section 412. Congress withdrew our plenary jurisdiction by making the filings of carrier agreements optional. In addition, the sole purpose of amending section 414 to convert section 414 from a automatic provision to one giving the Board discretion to withhold immunity was to expose carriers to the antitrust laws. In the absence of evidence to the contrary, we must assume that Congress foresaw and did not seek to protect carriers from exposure to antitrust liability, including the risk of adverse or conflicting decisions in the courts.

If the Board were required by the public interest to grant immunity in order to protect carriers from conflicting judicial decisions we would have no discretion at all. 423/ Parties could always argue that there is a possibility of different courts reaching different conclusions. While we believe this threat is greatly overstated, no agency can claim to predict future behavior of the courts. Instead, we have consistently held that the discretionary immunity provisions reflected a Congressional decision that exposure to antitrust liability before different courts is consistent with the competitive market-oriented system established by the Board. This conclusion has been affirmed by the courts in upholding our authority to prohibit the filing of agreements by air freight forwarders and domestic cargo carriers. 424/

In any event, our decision to give a transitional period of antitrust immunity to the agreements responds to the concerns that carriers will be immediately subject to relitigation of the issues raised in this proceeding.

4. Foreign Policy Effects.

Proponents argue that approval without immunity will appear to foreign governments as a hollow gesture tantamount to disapproval. They claim that our actions will be considered by foreign governments as a denial to their carriers of fair and equal access to U.S. markets, will lead to retaliation against U.S. carriers, and make it more difficult to obtain long-term U.S. international aviation goals.

423/ The cases cited by applicants involved agencies with plenary authority over all aspects of industries in which competition is intended to play little if any role. Not only has Congress made the filing of intercarrier agreements optional, it has substantially reduced our authority in the entry and pricing areas.

424/ National Small Shipments Traffic Conference v. CAB, 618 F.2d 286 (D.C. Cir. 1980).

This argument is basically the same argument concerning foreign government perceptions that was raised with respect to exclusivity. We have carefully considered the likely impact of withdrawal of antitrust immunity on the programs and we have concluded that with the opportunity to make further adjustments during the transition period, carriers will not face a high risk of antitrust challenge.

Grant of antitrust immunity solely to the IATA agreements could substantially undermine our objective to permit competition in ticket sales within the U.S. Virtually all travel agents are accredited by both the ATC and IATA and, as we have described, the IATA standards have generally been conformed to changes made by the ATC. If we were to grant antitrust immunity to IATA, several undesirable results might occur. Certain carriers might seek to adopt or continue anticompetitive restraints and seek foreign carrier support for initiatives designed to block competition on domestic sales. Moreover, agents could be forced to adhere to more restrictive IATA rules in order to retain their ability to sell international air transportation. Procompetitive changes in the ATC rules might therefore be of limited value to agents, carriers, and the public. While the ATC program has heretofore been the leader, grant of antitrust immunity could reverse this procedure, allowing foreign carriers to, in effect, dictate how airline tickets will be sold in the U.S. Alternatively, granting antitrust immunity to one system and not the other might result in divergent standards and thus increase the burdens on agents. Neither possible result is desirable. [425]

While we have carefully considered the claims about the spectre of antitrust lawsuits, foreign carriers do not now enjoy blanket immunity for their activities. Based on our conclusion that withdrawal of antitrust immunity will not jeopardize the agency distribution system, we find that foreign governments' interests in fair and equal access will not be materially affected. Foreign carrier speculation about antitrust exposure is not a sufficient basis to grant antitrust immunity to IATA carriers. We, therefore, conclude that foreign policy considerations do not require the grant of antitrust immunity after December 31, 1984.

CONCLUSION

This decision may be viewed by some as the beginning of a dramatic change in the air transportation distribution system. However, if changes are to occur, they will be in response to the demands of the marketplace. We have merely removed the constraints on competitive behavior in the existing system. We have carefully considered whether our actions will threaten the benefits of the existing system and conclude they will not.

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[425] *See* page 125, *supra*.

The choice is not, then, between continued regulation or destruction of the present system. Rather, we have taken the first steps toward increased competition while preserving the beneficial aspects of the present distribution system, and continued the process of removing ourselves from regulatory involvement in the airline industry.

ACCORDINGLY, an appropriate order will be entered.

Vice-Chairman BAILEY, Members DALLEY and SMITH concurred in the above opinion. Chairman MCKINNON and Member SCHAFFER concurred in part and dissented in part. Vice-Chairman BAILEY and Member DALLEY filed the attached joint concurring statement. Chairman MCKINNON filed the concurring in part and dissenting in part statement. Member SCHAFFER concurred only to the extent that the majority has affirmed the Initial Decision, and she has filed the attached dissenting statement.

BAILEY, VICE CHAIRMAN, AND DAILEY, MEMBER, CONCURRING:

With this decision, the Board has taken the first steps toward increasing competition and ending regulatory intervention in the marketing of air transportation. We join in the decision because we think these steps are in the right direction. However, we believe that the Board should have taken greater strides to complete the last major piece of unfinished business in the deregulation process.

Fares will be completely deregulated about the time this opinion issues; yet, the Board is allowing the many constraints on the marketing of air transportation to drag on. The Board has seemingly decided to handicap the competitive process for an additional two years. In this concurring statement, we wish to assert our ardent belief in the economic principle that unfettered competition should be the preferred mechanism to insure consumer welfare. Antitrust theory declares that the law must protect the competitive process, and is not concerned with the preservation or continued prosperity of existing competitors. While the Board appears to adhere to this principle in the long run, the motivation for approval of anticompetitive provisions for a two year period seems to be premised on reducing the impact of competition on travel agents.

First, the record does not support dire predictions about the effects of eliminating exclusivity. 1/ Travel agents that are already providing valuable services to the general public will continue to prosper under the Board's decision. Second, even assuming that some time for adjustment of interline agreements may be necessary, it is difficult to believe that it will take two years.

The decision on interline exclusivity is acceptable to us only because carriers will be free to permit unaccredited agents to interline if they can secure the agreement of some or all carriers who would be affected. Because carriers have previously recognized the economic benefits they derive from interlining, we are hopeful that they will act reasonably. Nevertheless, we are afraid that the Board has created a disincentive that is simply not justified.

1/ Travel agents might, at most, lose 2 percent of their market share according to ASTA's witness. ASTA-20 at 111. The only evidence cited by Judge Yoder to support his conclusion that agent exclusivity was essential to preserve the system were statements that without common accreditation, carriers would not participate. ID at 85. We will, of course, approve the common accreditation program and as the opinion correctly points out, economic integration in those areas really produces the system's efficiencies.

A carrier authorizing a person to write tickets on its behalf remains liable to other carriers for the interline transportation they provide under existing interline agreements. This type of undertaking should provide sufficient security for other interlining carriers. If another carrier is concerned about the qualifications of the unaccredited agent or the financial viability of the authorizing carrier, then the interline agreements could be modified on a case-by-case basis to deal with the uncommon problem. Our decision on interline exclusivity tends to establish the opposite presumption. We fear that potential entrants will therefore be forced to compete with one hand tied behind their backs. The Board should be very reluctant to try to manipulate the marketplace to protect existing firms.

The dissenting statement of Member Schaffer starts from precisely the opposite policy orientation in suggesting that the Board should open the door to competition, but should define what type of competitor should be allowed into the marketing system. The fundamental principle of deregulation is that individual carrier management should be free to make ordinary business decisions without government intervention to limit competitive options. It is impossible to reconcile this philosophy with the notion that the Board should act as a gatekeeper deciding in the first instance who should be allowed to enter. Nor is it any answer that carriers have in the past agreed to constrain their competitive options by means of an intercarrier agreement. The Airline Deregulation Act specifically adopted a competitive test based on antitrust principles to insure that individual responses to marketplace conditions would supplant the former regime of collective decisionmaking.

The antitrust laws seek to preserve opportunities for competition. They do not require certain behavior, believing that it is best to let firms make individual judgments about how to best satisfy marketplace demands. The efficiencies of the travel agent distribution system are presumably obvious to air carriers, so there is every reason to believe that they will continue to use travel agents. The government need not intervene to protect consumers from the presumably irrational economic behavior of airlines, as the dissent implies.

In other areas of our economy, competition in marketing services has often produced multifaceted distribution systems. This diversity does not imply the destruction of any particular distribution mode. Rather, the availability of marketplace alternatives enhances consumer options and encourages efficiencies. It would be ironic, indeed, if the Board were to decide that competition is a good idea for the airlines but is somehow to be distrusted when it comes to travel agents. The dissent never satisfactorily explains why the Board should become involved in regulating the marketing practices of air carriers at a time when all other carrier decisions are being left to the free marketplace.

The various BTD restrictions are nothing more then a refined version of the exclusivity provisions. The 20 percent rule is designed to foreclose entry by businesses that could meet the other legitimate qualifications for accreditation; the affiliated sales and common control provisions are a collective refusal to pay for a service because of the identity of the purchaser. The carrier concerns seem to relate to revenue diversion while the travel agent parties appear intent upon preserving their favored protected position. In either event, the agreement is not required to secure the efficiencies of the program 2/ but is instead directed toward hampering competitive behavior.

The argument that carriers do not want to compensate purchasers is irrelevant. The real issue under the antitrust laws is whether competitors should be allowed to reach collective economic decisions on price and output. In the absence of demonstrable efficiencies from the agreement, independent decisionmaking is required to insure competitive performance. As with exclusivity, the decision on whether or not to deal with corporations and at what compensation levels must be an individual carrier determination. 3/ Unlike the implications in the dissents of Chairman McKinnon and Member Schaffer, disapproval of these provisions would not force carriers to pay commissions to BTD's. They would simply be prohibited from agreeing to standards that are overbroad and that unreasonably deny competitive opportunities.

In addition to these obviously unreasonable restraints, we also question whether there is any basis to justify other rules such as certain location and in plant rules that are apparently targeted at excluding BTD's. As the Board's opinion points out, the carriers can adopt collective standards, but only if they are reasonably related to improved efficiency.

Perhaps the incentives of the BTD's to attack these restraints will diminish over time. However, if a corporation is really interested in securing agency status, it cannot be unreasonably excluded from pursuing this course. The mere possibility that some or even most BTD's would be satisfied with a discount in no way mitigates a finding of unlawfulness when an otherwise qualified business is unreasonably denied access to the industry-wide system.

The dissent of Member Schaffer never explains why carriers should be allowed to limit a corporation's choices in the marketplace. There is similarly no explanation of what is wrong with a firm profiting from sales to itself. The dissent implies that it is reasonable for corporations to get price concessions through discounts but they may not acquire or establish a subsidiary to operate as a travel agent, even if it would meet other accreditation standards, sell 79 percent of its tickets to the general public, 4/ and in short be indistinguishable from all other agencies. This runs counter to basic economic and political principles that govern in unregulated sectors of our economy. Nothing prohibits a company from earning

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2/ See opinion at 78, n. 260.

3/ There is some suggestion in the dissenting statements that these agreements are not anticompetitive. If the Board's opinion errs, it is in not finding the sales to affiliated company rule to be *per se* illegal; "An agreement that interfere[s] with the setting of price by free market forces is illegal on its face" *National Society of Professional Engineers v. U.S.*, 452 U.S. 679, 692 (1978). See also *Catalano v. Target Sales*, 446 U.S. 643, 648 (1980); *Sugar Institute v. U.S.*,

4/ Indeed, the ALJ recognized that the amount of self-dealing that was permitted represented an arbitrary figure. ID at 138.

a profit on a subsidiary's sales to the parent corporation. A prohibition on self-dealing would unjustifiably deter vertical integration because the efficiencies would be lost. Such a restraint would be readily condemned in other industries as contrary to the decisional freedoms that corporations enjoy. In this case, there is absolutely no justification to condone restrictions to protect those with whom a corporate user might compete. Such protection simply does not comport with accepted legal and economic thinking.

We also believe that extension of the 20 percent rule, the in-plant requirements and the affiliated sales and common control rules for a two year period is excessive but we join the majority because there is absolutely no justification to approve the present rules for an indefinite period. The Board's opinion assumes that the anticompetitive effect of these provisions will erode over time. We would strongly urge carriers not to rely on this optimistic assessment but rather to meet the substantive objections to these provisions now.

Because carriers must have an incentive to make these and other changes, we concur in the decision to withdraw antitrust immunity, although we think that the Board may have been too, solicitous in providing a two year period during which the agreements will be protected. However, the precise timeframe of the grace period is of secondary importance. Certainty is more critical to insure that the Board's decision can be effectuated. Certainty gives carriers and agents the incentive to react constructively and make the necessary changes to remove the anticompetitive features in the programs. Otherwise, there may be incentives to stall or posture in an attempt to influence regulatory judgments. We therefore believe that the Board should not sympathetically entertain requests to reconsider the withdrawal of antitrust immunity. Parties must demonstrate with substantial evidence that conditions have changed materially.

We have already reviewed a substantial amount of argument based on the benefits of the present system. We agreed with the proponents' basic argument that a system of accreditation provides procompetitive benefits and would not fail under the antitrust laws. We should, therefore, be wary about asserted public benefits that can only be achieved through anticompetitive means. Frankly, the claims about the need for antitrust immunity lack credibility in view of convincing arguments that , as modified, the agreements are not anticompetitive.

Another variant of the argument apparently is that the agreements have always enjoyed immunity, therefore they must need it. 5/ This reasoning is simply backwards. Carriers will now admittedly have to be concerned about antitrust issues when they never previously worried about the competitive impact of a provision. But this is precisely the orientation that should result from deregulation. The high cost of antitrust liability (treble damages) is set as an incentive to avoid anticompetitive behavior. We should not give immunity to avoid this cost. As in other areas that have been deregulated, a discomfort and uncertainty or overstated fear about antitrust liability is simply not enough to establish an important need for perpetual immunity.

/s/ Elizabeth E. Bailey　　　　/s/ George A. Dalley

5/ As the Board's opinion points out, immunity was once mandatory for any agreement approved by the Board. Under deregulation, we are obliged to grant immunity only if it is necessary.

CHAIRMAN McKINNON, CONCURRING IN PART AND DISSENTING IN PART:

Agency exclusivity reduces competition in the marketing of air transportation because it tends to prevent airlines from developing innovative marketing arrangements. Airlines should be free to develop their own ticket sales networks. Therefore, a two-year transition with antitrust immunity should be granted to the agent exclusivity arrangements for interline sales and, after that time, agency exclusivity should be eliminated. Competition is what made America great and if a travel agency is good this will not endanger its business.

With regard to business travel departments and antitrust immunity, I dissent from the majority position. Business travel departments do not function as travel agents and the airlines should not be required to compensate them as travel agents. The current business travel department arrangements should not be changed because the system was carefully conceived and works well.

After careful consideration, the facts show that antitrust immunity should be granted beyond 1984 for all approved conference programs so that the many public benefits of the established programs are preserved. In a thorough discussion during the open and public Board meeting, the majority decided that the Board should reexamine the antitrust immunity issue in the event that immunity is required in the public interest because of "materially changed circumstances or important needs" that come to the attention of the Board prior to the end of 1984.

/s/ Dan McKinnon

Dissenting Statement of Member Schaffer:

I agree with the reasoning and ultimate findings of the Administrative Law Judge and, with one significant exception concerning the exclusivity provisions, would have the Board issue an order in this case which is substantially similar to his opinion.

I cannot agree with the majority that the retention of agency exclusivity, as modified by the Judge and with the further modifications I discuss below, will reduce or eliminate competition. Agency exclusivity is simply designed to insure that airlines continue to maintain control over appointment of distributors who will be representing those carriers in an agency capacity to the public.

I agree with Judge Yoder's decision to distinguish marketing exclusivity from the overall exclusivity provisions. I too would disapprove marketing exclusivity to the extent that it inhibits the development of innovative forms of marketing outside of and different from the traditional agency relationship now existing between most distributors and air carriers.

I would broaden somewhat the Ticketron exception crafted by the Judge and would allow any non-agent marketer to distribute tickets if its sales were restricted to on-line tickets only and if it did not engage in travel counselling. These conditions would avoid the pitfalls that would result from non-appointed distributors selling tickets for several carriers as part of an interline transaction and would make clear that non-agent marketers could not engage in travel counselling in the sale of solely on-line tickets. I would make continuing approval of the agency exclusivity provisions contingent upon submission by the carriers of amendments which define and clarify the non-agent marketer exception in this manner to insure that potential entrants would not be blocked from the distribution system by objections and litigation based on whether they were or were not "agents." Careful clarification of the agency and non-agency categories by such amendment would eliminate the subjective screening and marketplace uncertainty the majority fears would occur if the marketing and agency exclusivity distinctions were maintained as recommended by the Judge.

I believe that agency exclusivity, tied to common accreditation, is important to the preservation of the interline program and the confidence carriers must have in one another's agents so that interlining opportunities can remain as available to the general public as they are today. The record is clear in establishing that frequent entry into the travel agent program has occurred and continues to occur. The number of applicants who are rejected for agency appointment is minimal. As I would modify them, the exclusivity provisions are clearly not anticompetitive. The Board should not bargain away the longstanding and well recognized benefits of an exclusive agency program which does not operate to exclude competitors. On the contrary, the exclusivity provisions were established to ensure competence, professionalism, and standards of operation for admission to the travel agency program.

Those provisions have accomplished these goals well, while, at the same time, providing for the accreditation of almost 20,000 agents throughout the nation. I cannot agree with the majority that the result has been a significant reduction in competition--rather the provisions have produced a distribution system which is efficient and enjoys a high degree of public confidence. To scrap this system in order to eliminate entry barriers which do not really exist is, in my view, a serious mistake.

I also agree with the Judge's disposition of the agreements affecting business travel departments (BTD's). BTD's are clearly not agents in any legal or practical sense of the word. Travel agents stand before the public as the representatives of the airlines for which they are authorized to distribute tickets. BTD's have no such relationship to the airlines. Rather they are the purchasers of air transportation. To permit accreditation of BTD's would render any concept of agency meaningless.

It is important to remember that the agreements which preclude the accreditation of BTD's in no way inhibit the ability of BTD's to obtain price discounts from the carriers with whom they deal. Without the need for any further action on the Board's part, businesses may negotiate such discounts with carriers. The level of such discounts will be more likely to reflect market realities than would agency commission rates, which do not reflect the relative volume of business that particular customers provide to an individual carrier.

I also cannot agree with the majority's findings that these agreements are anticompetitive. The provisions affecting BTD's do not foreclose their entry into the air transportation marketing system; they properly foreclose the use of the agency system to require or coerce the payment of commissions as a discount equivalent for business travel. Contrary to the majority's contention, I have seen no evidence in the record of this proceeding which shows that these provisions have, in fact, operated to unreasonably restrain competition in the marketing of air transportation. Given this fact, I can find no reason why BTD's must be permitted to be compensated through commissions for the purchase of air transportation solely for their own use.

We certainly have the authority to find, as the Judge did, that, as modified, the agreements are not anticompetitive, but that the public interest nonetheless requires exemption from the antitrust laws to insure that the parties can proceed with these programs. The majority's decision to grant only "transitional" or limited duration immunity is shortsighted.

Although these agreements are not anticompetitive, I believe that the Board should provide continued antitrust immunity in order to protect the agreements from the potential barrage of legal challenges. The time and cost which must be expended in defending the agreements may prove to be a disincentive to participation in the ATC as well as in the Area Settlement Plan. While it may be true that the possibility of repetitious or frivolous litigation is a risk that many other enterprises in our economy must bear, the Congress has, in enacting section 414 of the Federal Aviation Act, chosen to provide the particular protections afforded by antitrust immunity to the nation's air transportation system. I believe that it is the responsibility of the Board to insure that the nature and extent of the public benefits derived from these agreements be protected from the disruptive potential that would result from prolonged and prolific litigation.

The agency which receives our responsibilties for oversight in this area will, under the majority's approach, be faced with instantaneous withdrawal of both transitional immunity and interline exclusivity as soon as it receives the underlying jurisdiction. Regardless of what might be the ultimate consequences of the majority's decision, the better course would be to let our successor develop its own expertise and judgments in this area rather than mandating an irrevocable change in the entire marketing system and the immunity it has historically enjoyed on the very day on which our successor's jurisdiction begins.

/s/ Gloria Schaffer

Order 82-12-85

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its offices in Washington, D.C.
on the 16th day of December, 1982

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INVESTIGATION INTO THE COMPETITIVE : Docket 36595
MARKETING OF AIR TRANSPORTATION-- :
AGREEMENTS PHASES :

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ORDER

A full public hearing has been held in the above-entitled proceeding, and the Board, upon consideration of the record, has issued its opinion containing its findings, conclusions, and decision, which is attached and made a part of this order.

ACCORDINGLY:

1. We approve under section 412 of the Federal Aviation Act, as amended, Agreements CAB 28217, as amended by Agreements CAB 28217-A1 through A14 and A17, insofar as it establishes ATC Resolution 90.3, to the extent placed at issue in this proceeding, except as provided in ordering paragraphs 2 and 3;

2. We approve until December 31, 1984 Agreement CAB 28217, as amended by Agreements CAB 28217-A1 through A14 and A17, insofar as it establishes the following provisions:

   a. Section I (unnumbered paragraph 3), §X.A and §XX1.A.1 of Resolution 90.3 to the extent that such sections preclude member carriers from using and compensating nonaccredited agents or other persons to write interline transportation, as set forth in the attached opinion;

   b. Section IV.A.8, §XX1.C.8 and §XVI.C.3 of Resolution 90.3; and

   c. Section XX1.L. of Resolution 90.3.

3. We disapprove Agreement CAB 28217, as amended by Agreements CAB 28217-A1 through A14 and A17, insofar as it establishes the following provisions:

a. Section I (unnumbered paragraph 3), §X.A. and §XX1.A.1. of Resolution 90.3 to the extent that those sections preclude member carriers from using or compensating nonaccredited agents or other persons to write on-line transportation, as set forth in the attached opinion;

b. Section IV.D.3, §VII.J. and K., §XIV.A.6. of Resolution 90.3; and

c. Section II. (definition of Traffic Document), §VI.C., §VIII.C., D., and E., §X.H., §XI.B., C.,F., H., and J., §XII., §XIII.A., §XIV.A. and §XXV.D. of Resolution 90.3 to the extent that they give ATC control over unilateral carrier/agent settlement.

4. We approve Agreement CAB 27010, as amended by Agreements CAB 27010-A1 through A10, insofar as it establishes ATC Resolution 90.10, to the extent placed at issue in this proceeding;

5. We approve Agreement CAB 27004, as amended by Agreement CAB 27004-A1 and A3 through A9, insofar as it establishes ATC Resolution 90.4 to the extent placed at issue in this proceeding;

6. We approve Agreement CAB 27020, as amended by Agreements CAB 27020-A1 through A2, insofar as it establishes ATC Resolution 90.20, to the extent placed at issue in this proceeding;

7. We approve Agreement CAB 27001-A5, as amended by 27001-A12 and Agreement CAB 27004-A2, subject to the condition that agreements are filed in Docket 31133 within sixty days of the service date of this order amending the agreements set out there in the following respects: that ATC require an agent to execute a personal guarantee only if the agent defaulted or where the Travel Agent Commissioner so orders and clarify the application of the provision to limited partners and corporations;

8. We approve IATA Passenger Agency Resolution 802, as amended, to the extent placed at issue in this proceeding except as provided in ordering paragraphs 9 and 10; 1/

9. We approve as discussed in the attached opinion, until December 31, 1984 IATA Resolution 802, as amended, insofar as it establishes the following provisions:

1/ We refer to IATA resolution numbers, rather than CAB agreement numbers, because IATA resolutions have been assigned a variety of agreement numbers. This does not change the effect of our decision. With respect to both the ATC and IATA programs our grant of indefinite approval extends to all provisions placed at issue in this proceeding that we have previously approved pending its completion, unless specifically disapproved or granted limited approval.

a. Sections A(2) and (3) to the extent that these subsections preclude member carriers from using and compensating non-accredited agents or other persons to write interline transportation, as set forth in the attached opinion; and

b. Sections C(5) and G(7);

10. We disapprove IATA Resolution 802, as amended, insofar as it establishes the following provisions:

a. Subsections A(2) and (3) to the extent that those subsections preclude member carriers from using or compensating nonaccredited agents or other persons to write online transportation, as set forth in the attached opinion;

b. Sections C(14), G(2), F(6), and FF(3)(5);

c. Except to the extent otherwise disapproved, Section FF to the extent that it is mandatory for IATA members not using the Area Settlement Plan;

d. Section G(9) to the extent that it prevents carriers from agreeing to allow an agent to retain renumeration paid on refunded tickets; and

e. Sections B, E(1), FF(5), FF(7), FF(8) and FF(10), L(2) through (5), M(5) and H(3)(c) through (3)(e) to the extent that they give IATA control over unilateral carrier/agent settlment;

11. We approve IATA Resolution 876a, to the extent placed at issue, except sections (12) and (7)(c) thereof, which are dispproved;

12. We approve IATA Resolution 802d, subject to the condition that the resolution is amended within 60 days of the service date of this order to delete the words "up to" in section (3) and to provide that penalties assessed by the Commissioner may not be used to fund his office;

13. We approve IATA Resolution 802b, 802c, 802e and technical amendment 001a;

14. We approve IATA Cargo Agency Resolution 803, as amended, to the extent placed at issue in this proceeding, except, as provided in ordering paragraphs 15 and 16;

15. We approve until December 31, 1984 section A(3)(b) of Resolution 803;

16. We disapprove IATA Resolution 803, as amended, insofar as it establishes the following provisions;

a. Except to the extent otherwise disapproved, Sections G and GG to the extent those sections do not allow IATA member airlines participating in the Cargo Accounts Settlement System to either establish non-conference settlement arrangement with registered agents or to use some, but not all, of the agents, forwarders and shippers with which they do business;

b. Sections G(2)(6), G(2)(e), G(2)(f), G(3), and G(5) to the extent they preclude less frequent reporting and remitting schedules;

c. Sections G(9)(b), GG(8)(a) and GG(8)(d)(ii) to the extent those provisions preclude acceptance by members of less than tariff amounts in full satisfaction of their claims;

d. Sections G(7)(c)(iii) and GG(8)(a) to the extent those provisions require conference action where a bona fide commercial dispute exists between a member and an agent in default;

e. Except to the extent otherwise disapproved, Sections G(6)-(9) to the extent that those provisions grant IATA control over traffic documents and related materials furnished to agents by individual member airlines; and

f. Sections D(1)-(4), D(7), D(10), D(11), F(1)(c), G(2)(c) and G(2)(d), G(8)(a), G(9)(e), and GG(6)(g)-(i);

17. We approve IATA Resolution 803a to the extent placed at issue except sections (4)(g)(4)(i), (4)(j) and (4)(k), thereof;

18. We approve IATA Resolution 850a, to the extent placed at issue in this proceeding, on the condition that any registered agent that makes every effort to ascertain the proper rate shall have a complete defense to alleged violations of that section;

19. We approve IATA Resolution 801, to the extent placed at issue, except section (B)(21) thereof, which is disapproved;

20. We approve IATA Resolution 851, to the extent placed at issue in this proceeding, subject to the condition that the Cargo Accounts Settlement System is available for use by airlines with some, but not necessarily all, of its agents;

21. We grant IATA's motion to withdraw Resolutions 853 and 851a (formerly 807 and 823) from further consideration in this proceeding;

22. We approve technical amendments 001jj and 002, Resolutions 811, 801c, 803c and 813, to the extent placed at issue in this proceeding;

23. To the extent that agreements are approved, we exempt any person affected by this order from the operation of the antitrust laws until December 31, 1984, as provided in section 414 of the Act;

24. We grant the motions of Hawaiian/Aloha and Northwest for leave to file unauthorized documents;

25. We grant the motions of ATC, ASTA, ATN, BDA, IATA and IAAA to correct the transcripts of the oral argument;

26. We grant ATC's motion to mark for identification and receive into evidence a post oral argument exhibit;

27. We deny all other applications, motions, and other requests, except to the extent that they have been granted here; and

28. This investigation is terminated, except to the extent specific amendments are required.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Secretary

(SEAL)

APPENDIX A

DOCKET 36595

THE ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION REFERRED TO HEREIN IS NOT ATTACHED TO THIS COPY BECAUSE OF THE WIDE CIRCULATION GIVEN AT THE TIME OF ITS RELEASE.* THE INITIAL DECISION IS ATTACHED TO THE ORIGINAL OF THE BOARD'S OPINION AND TO THE OFFICIAL COPIES IN THE BOARD'S FILES AND MAY BE EXAMINED THERE. IT WILL ALSO BE PRINTED AS PART OF THE OFFICIAL "CIVIL AERONAUTICS BOARD REPORTS."

*SERVED: June 1, 1982

Appendix B
Page 1 of 1

TRAVEL AGENTS'SHARE OF VARIOUS CARRIERS' DOMESTIC PASSENGER SALES

	Passenger Sales-1979			
Carrier	Travel Agents (000)	All Other (000)	Total (000)	Percent Travel Agent
Air California 1/	$ 43,456	$ 62,786	$ 106,242	40.9%
Air New England 1/	9,900	21,524	31,424	31.5
American Airlines	1,467,748	1,386,127	2,853,875	51.4
Continental	355,780	321,077	676,857	52.6
Delta Airlines	816,519	1,205,340	2,021,859	40.4
Eastern Airlines	1,139,235	1,164,550	2,303,785	49.5
Frontier Airlines	120,052	153,615	273,667	43.9
Hawaiian Airlines	54,986	25,910	80,896	68.0
Hughes Airwest	145,870	120,592	266,462	54.7
Northwest Airlines	285,891	235,872	521,763	54.8
Pan American 1,2/	344,000	219,000	563,000	61.1
Trans World	1,071,072	500,514	1,571,586	68.2
United Airlines 3/	2,011,000	1,846,000	3,857,000	52.1
U.S. Air	264,700	237,000	501,700	52.8
Western Airlines	388,126	284,354	672,480	57.7
Wien Air Alaska	10,510	37,571	48,081	21.9
Total:	$8,528,845	$7,821,832	$16,350,677	52.2%

1/ Data Based on 1979 statistics rather than 1978.
2/ Figure based on "direct airline sales" rather than "all other sales."
3/ Figure based on "dollar volume of United States."

Source: Exhibit TKTN-213.

A. The ATC and IATA financial rules are as follows:

ATC - Resolution 90.3 §C

>

1. The Agent will,..., maintain,...a bond or bonds...in the minimum amount of $10,000, such amount to be increased whenever necessary to cover [one months sales] ...for the account of members of the Conference: However, (a) the Agent is not required to maintain said bond in amount in excess of $50,000; (b) the Agent shall be relieved of the requirement to provide coverage in excess of the $10,000 minimum if:

   (i) The Agent is operated by a bank as a special department, or

   (ii) The Agent submits to the Administrator annually a current balance sheet, ... which establishes that total assets available for satisfaction of debts exceed liabilities by at least $75,000, and the credit rating of the Agent, if published by Dun and Bradstreet or other recognized credit-rating agency, is shown as "good" or higher.

2. After the Agent has been on the Agency list for one year, adjustment of the amount of the bond to provide coverage in excess of the $10,000 minimum shall be made at least once a year, and at any other time when the amount of the Agent's bond fails by $2,000 or more to provide the required coverage. Nothing herein shall be deemed to preclude an Agent from reducing the amount of coverage whenever consideration of his sales experience for the most recent twelve consecutive months shows him to be carrying a bond in excess of that herein required.

3. After the Agent has been on the Agency list for one year, the Agent may substitute an irrevocable bank letter of credit (in a form to be prescribed by the Administrator) for the bond required herein. Such letter of credit shall at all times be in an amount at least equal to the amount of the bond required herein and shall be adjusted in accordance with subsection 2. above.

4. In lieu of the bond, an applicant may submit an undertaking by a surety that it will issue such bond upon receipt of notice that the applicant has been found eligible for inclusion on the Agency list.

IATA - Resolution 802, D

"(1) the applicant must provide a statement of assets and liabilities...showing that the Agent is solvent and of a satisfactory financial standing to meet his financial obligations.

(2) the following considerations will be observed by the Agency Administrator in respect of an application for inclusion on the IATA Agency List:

(a) Working Capital

(i) Application for Home Office Location:

the applicants...current assets must exceed the current liabilities by an amount of not less than $15,000,

(ii) Application for Branch Office Locations:

the Home Office Financial statement must be included...the current assets must exceed the current liabilities by an amount of not less than $15,000 for the Home Office Location, plus $5,000 for each Branch Office Location,

* * *

(b) Shareholder's Equity or Capital

in the case of a stock coporation, investment of the principals in the Agent must not be less than $20,000 in net worth;

* * *

B. In addition, ATC has requested approval of a personal guarantee requirement that would take effect to cover losses in excess of the Agent's bond in the event of default. ATC would amend the passenger agency resolution to incorporate the following language:

5. In addition to the requirements and conditions specified above, any restoration of [ticketing materials] ...shall be conditioned upon the Agent's causing to be executed and filed with the Executive Secretary a "Guarantee of Performance of Agent's Agreement", Schedule E. of Resolution 90.2.

* * *

E. (1) A "Guarantee of Performance of Agent's Agreement", as set forth in the Schedule E of the Sales Agency Agreement, shall be executed by (a) persons who are added as Agents to the Agency List, (b) applicants for change of ownership pursuant to this Resolution, (c) Agents who are declared in default pursuant to Section VIII.A. of this Resolution, and, upon demand, failed immediately to provided a certified check(s) in replacement for a dishonored check(s), or fail immediately to provide a missing sales report(s), and (d) Agents who are required by the Commissioner...

(2) Obligors on such Guarantee shall include:

a. all persons having a stock or other beneficial interest of 50 percent or more in applicant, or Agent, as the case may be, and all officers, directors or employees having a stock or other beneficial interest of 10 percent or more in applicant, or Agent, if such is a corporation; or

b. each partner and the spouse of each partner, if applicant or Agent is a partnership; or

c. the spouse of applicant or Agent which is a sole proprietorship."

* * *

A Personal Guarantee of Performance of Agent's Agreement Supplement is appended hereto and incorporated herein. Such guarantee shall be separately executed on behalf of the Agent when such guarantee is required pursuant to Section XVII of the Air Traffic Conference Agency Resolution...

C. The ATC and IATA provisions concerning honesty are as follows:

ATC Resolution 90.3 §IV.D.

General Qualifications

1. The applicant is ineligible for inclusion on the Agency List where investigation reveals, or the Administrator has reason to believe, that there is a material misrepresentation or inaccuracy in the application of any attachments thereto, or, that such applicant fails to meet the requirements of this agreement.

2. The applicant is ineligible for inclusion on the Agency List if the Administrator has reason to believe that the applicant, or any person holding a financial or ownership interest in the applicant, or any officer of the applicant or the qualifying manager, or any person employed by it in any capacity:

* * * *

c. Has been convicted of a felony or a misdemeanor related to financial activities or a breach of fiduciary duty involving the use of funds of others; or,

d. Has been denied application for a travel agent license by an governmental authority, or has had a travel agent license suspended, revoked or cancelled by any governmental authority, or, unless, based upon investigation, experience of the mergers with such person(s), where applicable, and all information and facts available, it is determined by the Administrator that the applicant can be relied on to adhere to the terms of this agreement.

IATA Resolution 802 §C

Qualifications for Approval and Retention

Any person may become an Approved Agent by meeting the following qualifications and submitting an application to the Agency Administrator in the prescribed form. The qualifications must continue to be met in order to ensure retention as an Approved Agent (in which event the term "applicant" where used in this Section shall be understood to include an Approved Agent.

* * *

(8) the applicant and those who direct its operations, has not been found guilty of wilful violations of fiduciary obligations to the public or to airlines.

* * *

(10) all material statements made in the application are accurate and complete.

* * *

(15) no applicant shall be included on the Agency List where any person holding a financial interest in the applicant or employed by the applicant holds or has held a financial interest in or a managerial position with an Agent which is presently under suspension or pending action of any kind by the IATA Travel Agency Commissioner unless based upon investigation and all information and facts available, it is determined that the applicant can be relied on to adhere to the terms of the Passenger Agency Agreement.

D. The competency or personnel provisions are as follows:

ATC Resolution 90.3 §IVB

The applicant shall have at least one person who is employed full time (and at least 35 hours per week) at the place of business, and is either the owner, partner, officer or manager who fulfills each of the following qualifications:

1. Exercises daily supervision of, and responsibility for the operations of that agency location and has the authority to make management decisions therefore;

2. Demonstrates a working knowledge of the ATC Travel Agent's Handbook by successfully completing a written questionnaire;

3. Has at least two years' experience of full-time employment as a travel counselor or a manager in the passenger transportation business; and

4. In addition, the foregoing person or another full-time employee of the applicant staffing the location for which the application is intended has had, within the past three years, one year's experience in airline passenger ticketing in the full-time employment of either an ATC or IATA member airline, or a travel agency included on the ATC or IATA Agency Lists. One year's experience in an ATA or IATA member airline or a travel agency included on the ATC or IATA Agency List working with automated ticketing equipment will meet this requirement. Any tenure of service with one employer for less than six months will not be considered towards meeting this requirement.

Paragraphs 1 through 3 establish ATC's managerial requirements--paragraph 4 its ticketing requirements. ATC defines travel counselor as "...any individual dealing with the general public in the promotion or sales of general travel services, such as tour, cruise, hotel and air arrangements." (ATC Res. 90.3 §II).

IATA Resolution 802, §C

"Any person may become an approved agent by meeting the following qualifications...

* * *

(3) at least one person who is employed full-time at the location for which application is made and is either the owner (including any one partner or stockholder with at least a 30% ownership interest), or the manager (who exercises daily supervision of all operations of the Agent) must fulfill each of the following qualifications:

(a) demonstrate knowledge of the Resolutions, rules and procedures contained in the IATA Travel Agent's Handbook; and

(b) have at least two years' experience of full-time employment as a travel counselor or manager in the travel business.

(4) there must be at least one person employed full-time who is engaged in writing tickets or supervising those who write tickets and that person must have had at least one year's experience within the past three years of full-time employment in an Approved Agent or in an airline office, and whose employment included writing tickets."

(Paragraph 3 established IATA's managerial requirement and paragraph 4 its ticketing requirement.

IATA does not include a definition of travel counselor in its resolutions.

E. The location provisions are as follows:

ATC Resolution 90.3 §A

A. LOCATION AND OTHER QUALIFICATIONS

The applicant, to be included and retained on the Agency List, must meet each of the following qualifications:

1. Be advertised and otherwise represented as an office for the sale of air passenger transportation and services related thereto, and be so identified to the public;
2. Have a name which is not the same as, or misleadingly similar to, an airline, and not be identified as an airline office;
3. Be open and freely accessible to the general public for the promotion and sale of general travel services, such as tour itineraries, sightseeing arrangements, and hotel reservations;
4. Be open for business on a regular schedule and no less than 35 hours per week or, upon review and approval of specific circumstances by the Administrator, on a regular shorter schedule in accordance with local business practices;
5. Have facilities or arrangements necessary to insure security of tickets and validation plates, as set forth in Attachment B of this agreement;
6. Be engaged solely in the promotion and sale of passenger transportation and general travel services. The words "engaged solely in" apply only with respect to the office, department or space which the applicant purports to be the place of business.
7. (Deliberately left blank)

IATA Resolution 802 §C

"Any person may become an approved agent by meeting the following qualifications...

* * *

> (5) the place of business for which approval is sought, or has been granted, is indentified as a travel agency, is open for business on a regular schedule in accordance with local business practices and freely accessible to the general public for the sale of international air transportation, and does at least 80% of its business with members of the general public.
>
> (6) the applicant shall not be located in office space jointly occupied with another travel agency, an Approved Agent or an air carrier.
>
> (7) the applicant does not have a name which is the same as, or is misleadingly similar to, that of an IATA Carrier or IATA. The place of business must not be identified as an airline office.
>
> * * *
>
> (12) the applicant meets the standards for security of Traffic Documents and Airline identification plates set forth in the IATA Travel Agent's Handbook.

Mr. McKINNON. In short, the agency agreements have little, if anything, to do with interlining.

We will monitor the system. If there are clear signs that consumers are hurt because interlining is deteriorating, we will not hesitate to take action. Our interest is to have a solid efficient airline system—but a truly competitive one that makes for efficient use of assets and people—because that will best serve the public interest.

What about the airlines? There are several reasons why some of them resisted this decision.

Change is always upsetting.

Exclusivity makes marketing decisions easier and costs more predictable. Since the only nonairline sales allowed before the Board's decision were through travel agents, cheaper marketing innovations were effectively foreclosed. All a carrier needed do to avoid competitive disadvantage was pay travel agents at the same commission rate as its competitor. The costs were then passed on to the consumer.

I believe that airlines do not feel free to speak their minds, because agents have the ability to affect airline revenues by shifting their business.

There is competition on most routes. So, if an airline steps out of line in the travel agents' point of view—or does anything that could affect the agents' commissions—they will simply book around the airline to teach them a lesson.

And they have done it in the past to keep commissions higher.

The airline risk is substantial, particularly when the Board's decision has become a litmus test of airline loyalty.

Certain carriers may have a vested interest in retaining a unitary travel agent system because their travel agent computer reservations systems steer more traffic to them. Any effective alternatives to the agency system will tend to dilute the effect of computer bias.

So, it is not surprising to me that carriers have not publicly supported our decision. Nor should it be to anyone else.

Some foreign air carriers in turn are concerned that as a result of our decision, U.S. airlines will be able to prevent them from selling tickets here by creating an exclusive or captive agency system.

There is also no factual support for the argument that exclusive dealerships are an inevitable result of competition. Most businesses want to carry as many product lines as possible. Groceries, brokerages, and independent insurance firms are good examples.

In most cases neither the airlines nor the agents have much to gain from breaking up. They would only lose revenue, without a compensating benefit. Captive agents might develop in a few high-density markets. But they will not replace full-service outlets. Finally, consumers can identify specialized airline outlets, as they do now in other industries.

How will the Board's decision provide greater public benefits?

First, existing agents are likely to become more productive. Many agents have begun to evaluate how they can provide better services to passengers.

Articles in the trade press show that the threat of potential competition is not just a theory; it works in reality. Agents are developing a real interest in improving their services. They have begun to advertise to let consumers know how agents better serve their interests. There is a real effort by agents now to provide even better services.

I believe that there are a lot of travel agents out there—small and large—that have good ideas worth pursuing in a truly free market.

Second, the Board's decision will help many travel agents because they can now bring their business skills to bear, for the first time, without having to convince all airlines and all other agents to change the system.

Third, many of the accreditation requirements are not just minimum standards. The accreditation standards control almost all aspects of how an agent can operate.

There are plenty of exceptions—such as BTD's and in-plant agency locations—to prove that certain personnel and location standards are not needed to protect the airlines or their passengers.

The argument that almost anyone can become an agent—that entry is not limited—just does not match up with the facts.

ATC claims that only 5 percent of serious applications are denied. But far more people are interested enough to inquire about becoming an agent and get weeded out.

Most of those that do not qualify under one or more of these strict requirements do not apply for accreditation.

It is fallacy to assume that all those who inquire but do not apply are not serious candidates.

Entry is now discouraged by ATC and IATA by banning certain business practices entirely or by increasing costs for some types of business.

For example, a department store chain might want to enter the industry. It would have to consider the cost of employing personnel meeting the ATC or IATA standards. It, like American Express, might find the personnel standards unduly burdensome.

Fourth, airlines can consider innovative ideas, as I mentioned before. Not all airlines may wish to participate in other marketing schemes. But their competitors and existing distributors—acting together—should not be able to block the use of other distribution ideas. New creative ideas make America great.

Before the Board's decision, if an airline wanted to experiment with a new idea in selling tickets, the price for such experimentation was losing the automatic representation of the 22,000 ATC and IATA agents.

This is too great a price to pay. The marketing decision removed this impediment and will ultimately offer consumers a way to pay for only what they use.

Fifth, new ticket outlets can specialize in catering to passengers who know exactly what they want. Those tickets could be sold at a lower cost. Some efficient agents are already returning a part of their commissions to selected customers. It is only a matter of time before the general public shares this benefit.

Competition will thus offer consumers a clear gain, through a wider choice of service and price options. In air travel there will be choices. But the end product—an airline seat—will be the same regardless of how it is acquired.

Another aspect of the Board's decision is the eventual elimination of antitrust immunity. You may be told that the agency system will collapse—and you have been—unless immunity is retained. The fact is, that the airlines can—and will—design conference programs that comply with the antitrust laws.

When you read through the Board's order, you will find we even suggested some changes that would bring the current system more in line with those antitrust laws.

The antitrust laws do not prohibit competitors from engaging in cooperative activity. They merely prohibit competitors from cooperating in ways that have a significant adverse effect on competition. There are dozens of examples of cooperative activities going on right now that are not protected from antitrust attack.

Some examples are:

The Airline Clearinghouse, that performs a settlement function much like the area settlement plan;

The Consolidated Air Tour Manual, that lists available packages of ground and transportation; and

The Allegheny Commuter agreements.

Among the other cooperative activities that go on every day without immunity are the real estate multilisting services, the various wire services, sports leagues, such as the Professional Golfers' Association and National Football League, and trade association programs to exchange information and establish standards.

It has been said that airlines and agents need immunity to protect themselves from frivolous lawsuits that cost a lot of money to defend. In view of the substantial benefits of the conference programs and the area settlement plan, airlines will not abandon the conference system because of the threat of unjustified, frivolous lawsuits.

In fact, John Zeeman, head of marketing and ticket sales for United Airlines, recently came to the very same conclusion in an interview published in Travel Weekly.

Although I cannot deny that frivolous lawsuits can happen, it is ironic that just last month—in the computer reservations hearings—people were telling you that meritorious lawsuits are too expensive to bring.

Those are contradictory claims.

The simple fact is that businesses can seek antitrust counseling to reduce the risk of lawsuits.

The Department of Justice will give advisory opinions. Indeed, a spokesman for the department has already said that a cooperative agency venture would be OK if some needlessly restrictive provisions are changed.

The benefit of the Board's approach is that the possibility of antitrust liability creates an incentive to ensure that the rules and the enforcement of these rules do not improperly restrict competition.

That is the same incentive that keeps other cooperative ventures honest. But when immunity is granted to any industry, competition inevitably will be restrained. Also, the grant of antitrust immunity has both economic and social costs. It costs airlines a lot of time and money.

Regulation also creates costs for the Government, and ultimately the taxpayer.

Immunity requires the Government to review each agreement closely. The review process is a difficult one. It requires constant fine tuning, constant monitoring, and the Government trying to foresee future consequences. Those costs often outweigh any benefits.

The immunity issue is not a question of avoiding costs. It is really a question of whether self-regulation, disciplined by the laws of competition, serves the public interest better than administrative oversight.

Neither system is perfect. But it is the judgment of the Board, weighing the facts, law, and national aviation policy, that regulation comes in a poor second in a two-way race.

You might hear arguments that the Board has ignored the intent of Congress by ending antitrust immunity for the agency agreements.

There is no support for this claim. The Board was instructed by Congress to review and report on all its grants of immunity. We took a pragmatic look at the agency agreements. We are willing to take another look at the issue before sunset.

We clearly told the agents, if there are materially changed circumstances, or if an important need is shown, we will reconsider the decision. They will have a fair hearing next year if they want it and have the facts to prove the need to continue antitrust immunity. So far, based on the facts, they have not proven their case, so the need does not seem to be there. That is in tune with what Congress has told us to do.

Finally, I would like to address the claim that the Board has disregarded U.S. foreign aviation and the views of the Department of State in its decision. The Department of State knows how to make its views known. The Department's major concern was with the common accreditation agreements, which we did not disturb, not with exclusivity or immunity. We feel we have been responsive to the Department's concerns.

Still, some foreign airlines say we have denied them fair and equal access to U.S. markets.

Our decision will not affect fair and equal access. If by some chance it should, the Board is fully prepared to uphold U.S. bilateral obligations, even though U.S. airlines sometimes are discriminated against in foreign marketing systems.

To sum up, if Congress wants to protect consumers, H.R. 2053 is not the way to do it. H.R. 2053 would abrogate accepted administrative procedures, reverse the policy of airline deregulation and injure consumer interests.

When it comes to selecting between the economic good of the many and the narrow interests of the few, we, as Americans, have generally rejected the idea of special treatment. Competition has made America great—and that is what this issue is all about.

This is the end of my testimony.

I would like to make several comments on questions this morning, to clear the record.

There was discussion of temporary locations being set up for travel agents. Under the current system that is not possible. As a matter of fact, a recent example was the Williamsburg summit. There were 6,000 people there. Someone wanted to set up a temporary travel agency down there.

ATC said they could not do it. The only way to do it was establishment of a temporary sales office set up by the airlines. Also, I believe inadvertently Congressman Anderson mentioned the antitrust agreements provided by the CAB were involved in rate and route protection. But that is not the case with CAB antitrust immunity. It is basically involved with agreements.

I just wanted to be sure, to correct the record. I am sure that was an inadvertent description.

There was testimony this morning that the travel agency business was good for minorities. I would point out any of the new ideas that come along could involve women just as well as old ideas.

With that, I am at your pleasure for any questions you might have, Mr. Chairman.

[The following was received from Mr. McKinnon:]

CHART No. 1

THE EXPLOSIVE GROWTH OF TRAVEL AGENTS

Agency Locations on ATC Agency List and Annual Changes

Year End	No. on List	Included in Following Year	Percent Increase	Deleted in Following Year	Net Increase	Net Percentage Increase
1958	2,871	434	15.1	47	387	13.5
1959	3,258	750	23.0	69	681	20.9
1960a/	3,939	577	14.6	109	468	11.9
1961	4,407	437	9.9	141	296	6.7
1962b/	4,703	594	12.6	187	407	8.7
1963	5,110	516	10.1	140	376	7.4
1964	5,486	374*	6.8	230*	144	2.6
1965	5,630*	520	9.2	178	342	6.1
1966	5,972	539	9.0	249	290	4.9
1967	6,262	578	9.2	149	429	6.9
1968	6,691	632	9.4	204	428	6.4
1969	7,119	770	10.8	212	558	7.8
1970	7,677	790	10.3	258	532	6.9
1971	8,209	1,061	12.9	143	918	11.2
1972	9,127	1,272	13.9	193	1,079	11.8
1973	10,206	1,395	13.7	205	1,190	11.7
1974	11,396	1,396	12.2	355	1,041	9.1
1975	12,437	1,582	12.7	358	1,224	9.8
1976	13,661	1,718	12.6	326	1,392	10.2
1977c/	15,053	1,939	12.9	364	1,575	10.5
1978	16,628	1,965	11.8	472	1,493	9.0
1979	18,121	1,602	8.8	375	1,227	9.6
1980d/	17,339	2,248	13.0	384	1,864	10.8
1981	19,203	2,363	12.3	604	1,789	9.2
1982	20,962					

* Number of agents on list, as of Dec. 31, 1965, counted by computer for first time. The additions and deletions processed during 1965 had to be adjusted to reflect a decrease of 152 agency locations from a manual total count of 5,782 in order to coincide with the computed count of 5,630.

a/ "Need" clause eliminated.

b/ Bond requirement instituted.

c/ Began 1977 with implementation of travel agent commissioner and discontinuance of agency committee reviews of U.S. agent/applicants.

d/ Effective Oct. 1, 1980, Canada was removed from the ATC program. The figures are based on U.S. agents only.

Source: Travel Weekly's 25th Anniversary Issue
page 80, May 31, 1983.

Mr. MINETA. Thank you very much, Mr. Chairman.

One of the criticisms which has been made of the CAB's decision is that the Board reversed the ALJ's decision even though the ALJ had personally heard testimony totaling 40,000 pages of transcript. I wonder if you could describe for the record the deliberations the Board took before it reached its decision to reverse the ALJ.

Mr. MCKINNON. Yes, sir. Briefly the Board's advisory staff spent 5 man-years preparing us for this case by compiling 183 pages of memos, we had 2 full days of oral argument, 40 hours of Board discussion. The detailed breakdown as follows. At least one Board staff attorney monitored the hearings. Frequently a second attorney was required. These staff persons were fully versed on the record as of June 1, 1982, when the ALJ's decision was issued. A conservative estimate is that the Board's legal and advisory staffs spent 5 man-years preparing for the Board's decision.

Before oral argument the staff presented the Board six memoranda totaling 70 single-spaced pages setting out various issues raised by the parties. Staff met with individual board members 10 times before oral argument to explain issues raised in the case. As a result of the meetings a lively and lengthy oral argument lasting 2 full business days was held.

Additional memos providing information on the initial decision explained arguments and briefs and provided staff analysis. A total of 113 pages were transmitted to the Board. Altogether the Board members had more than 35 hours of discussions with staff in 19 meetings. In addition almost 5 hours of sunshine meetings discussing only this case were held. These figures don't include the Board's five attorneys that participated as trial staff at the hearing over the 3-year period.

I also might share, Mr. Chairman, this was a hot issue when I came to the CAB as chairman. There was a movement, some feeling by some Board members that the law judge's decision should be short-circuited and that this case should be brought directly to the Board. I insisted it proceed through the law judge and the law judge be allowed to give us his recommended decision.

Following that I insisted within our staff that there be a division of people to argue before the Board members on an individual basis the merits for the law judge's decision and against it. So that we just were not captive to one segment of our staff, but we were forced to hear both sides of the story in every possible detail in this case so that we would have an opportunity to judge and evaluate all the facts and maybe uncover something that neglected to come to our attention.

Also the oral argument, which many didn't expect to go very long, lasted 2 full days. At the end of that argument I asked every single person in the room that made an oral presentation to the Civil Aeronautics Board, were there any facts, was there any information that had not been brought to the attention of the Civil Aeronautics Board that needed to be brought to our attention to make an intelligent decision?

Everybody in the oral argument, both sides, everybody that was involved had the opportunity at that time to share with us any additional details they felt were not brought up in this case through the oral argument. I felt and very specifically raised that question with them to be absolutely certain that any questions had the opportunity to come before us. So I feel we had a thorough analysis of all the facts involved in this. And all the 40,000 pages of testimony was sort of sifted down into the key ingredients that comprised the decision.

Mr. MINETA. Some opponents of the CAB decision complained that under the ALJ's decision, travel agents would be subject to substantial new competition. The ALJ would allow the airlines to sell tickets to persons who are not ATC agents so long as these sellers did not function as agents.

The ALJ also would allow the airlines to sell tickets through Ticketron. Why doesn't the Board think that this would be sufficient competition?

Mr. MCKINNON. Well, having the travel agent system determine who the competition is going to be doesn't seem very innovative to me. As a matter of fact, it is somewhat like the fox guarding the hen house. Just the agents and the airlines are going to determine who can be their competition. We think the consumers, not the competitors, should be the ones that are deciding whether new ideas succeed or fail. Ticketron would just be one possibility. Why should other new creative innotative ideas in this era of marvelous electronics be excluded? Why should somebody, even a travel agent with a new creative idea that would help him competitively, be excluded?

We felt that just having one new type of competitor would not be a healthy situation. You know actual meaningful competition occurs only when you don't have the permission of all your competitors and the government to let you act the way you think is going to serve the consumer's best interests.

Mr. MINETA. Since the Board's decision last December, the airlines have been free to sell on-line transportation through agents who do not meet ATC criteria to sell on-line transportation. We are not aware of any airlines which have taken advantage of this opportunity. Is the Board aware of any cases in which an airline has used a non-ATC agent?

Mr. MCKINNON. No, sir.

Mr. MINETA. In your opinion why haven't these airlines, do you think, been using other agents?

Mr. MCKINNON. Quite frankly, Mr. Chairman, I think they are waiting to see what you are going to do with H.R. 2053. They are waiting to see what the court cases are going to do before they get themselves exposed and out of step with travel agents if they come up with something new and creative, because if they don't work out to where you have a competitive environment they may have their necks stuck out a little too far.

Mr. MINETA. H.R. 2053 requires CAB to adopt an ALJ's initial decision as the Board's final decision. This seems to be an unusual legislative format. Usually Congress either legislates directly to an issue and doesn't leave an agency any discretion, or else Congress sets out general standards and gives the agency discretion to apply these standards in each case. Here Congress would be in effect directing an agency on how to decide a specific case while continuing general standards and discretion for other cases.

In the Board's opinion does the legislative format of adopting an ALJ's decision raise any legal or regulatory problems?

Mr. McKINNON. Mr. Chairman, I think if you adopt an administrative law judge's decision you are setting a dangerous precedent. I can find no place else that I have run across where the Congress has overturned a board or commission that they have approved of through the advice and consent of the Senate, any action they have taken in favor of, in essence, a hired hand of that particular agency. You would be saying to the men and women that you have asked to perform a service that an employee of that organization's power is greater than theirs. You asked us to analyze the facts. That is what we did. We analyzed all the facts in this case very thoroughly.

As a result we came up with five people analyzing the facts, a good sound decision. If you just took the one man's facts, the law judge, you have only got one person's analysis of the facts.

In addition, if you accept this piece of legislation the way it is worded now, I think from this morning you can tell there would be a lot of problems and grave questions in my mind whether the Civil Aeronautics Board would ever be able to become involved in these areas in the future if you pass this law. This might possibly and it sure would be argued that it would exclude us from visiting any aspects of this situation.

Mr. MINETA. I am particularly concerned that the Yoder decision seems rather vague on certain key points. For example, what constitutes a nonagent marketer of tickets, and how unique is its status given to Ticketron? If we were to legislatively impose the Yoder decision, would we be creating problems by locking in those rather vague aspects of the decision?

Mr. McKINNON. As a matter of fact, in his decision and even with the travel agents there was great confusion over agency and marketing exclusivity. There is a lot of things I think in there that you are going to find would be very tough to incorporate into law the way you have outlined it right now. It would sure take a lot of amending if you decided to go this way. Of course I hope you don't go this way, Mr. Chairman. I don't think it would serve the public interest.

Mr. MINETA. I have several questions on the future of interlining. First, do I understand correctly that the basic interlining agreements were not in issue in the competitive marketing case?

Mr. McKINNON. Yes, sir.

Mr. MINETA. Isn't it essential for interlining that each carrier have confidence in the agents used by other carriers? Can this confidence exist if airlines are free to use agents who do not meet ATC criteria?

Mr. McKINNON. I think it is important to note here that interlining really is not dependent on the confidence of airlines in another carrier's agent. The interlining depends on confidence in the other airline that is going to provide the service. It is not so much who wrote the ticket. It is who is going to provide the service. That is the benefit on the interlining aspect of it.

Who is getting paid for the transportation? The other carrier is not going to get paid by the travel agent that is paid for the transportation; it is paid by the carrier whose stock that ticket was written on. I don't think that—I think that covers your question.

Mr. MINETA. Mr. Chairman, your testimony suggests that a grant of antitrust immunity is not a one-stop process. It requires continuing government oversight to see if immunity is still warranted and to see whether proposed changes to an agreement qualify for an antitrust immunity. Could you at this time or later for the record give us data on the Board's historic experience with amendents to the travel agent agreements? Approximately how many amendments a year are submitted for Board consideration? Have there been cases in which the agents have objected to the grant of antitrust immunity for proposed amendments to the agreement?

Mr. MCKINNON. Well, sir, I can give you figures. In our detailed written testimony we point out that since 1979, ATC has submitted more than 60 amendments to the passenger agency agreements it issued in the marketing case. That is obviously a considerable number. Between 1951 and 1979 ATC amended its basic passenger agreements 250 times.

Mr. MINETA. We have heard that this is a complex marketplace and a consumer needs an expert agent to help him or her find their way through it. The existing system allows for accreditation of agents for their honesty, their experience and financial responsibility.

Is there an existing accreditation standard for competence? Do travel agents have to take a test that shows they are competent to figure out the complex scheduling options and write a ticket?

Mr. MCKINNON. You know, several years ago there was a discussion with the airlines that wanted to have a test of all travel agents to find out about their competency. And travel agents looked at it, thought it was a good idea until they found out there was no grandfathering in. When they discovered that it was going to be required that they all take a test on how to operate as a travel agent, travel agents were not very excited about that idea and it eventually dissolved.

Mr. MINETA. I take it that there is no competence test, then, as far as agents are concerned?

Mr. MCKINNON. No, sir. The only standards really are that they have got to employ a manager at every location with 2-years' experience promoting transportation. They must have an employee with 1 year ticket writing experience gained with an ATC or IATA carrier or travel agency. They must have a location open and accessible to the general public and clearly identified. They must have a qualified manager on duty and be open for business 35 hours a week. And they must appear likely to do no more than 20 percent of their business with an affiliated corporation or its shareholders or employees. So that is all.

Of course the manager must know the Travel Agency Handbook. But that is the requirement to be a travel agent.

Mr. MINETA. So the existing system, while producing generally competent travel agents, gives us no guarantee that each agent has been tested for competence; is that correct?

Mr. MCKINNON. Yes, sir.

Mr. **Mineta**. Under your decision there would be no problem with ATC agreements continuing to set agent accreditation standards for honesty, competence and financial responsibility?

Mr. **McKinnon**. No, that is not going to change.

Mr. **Mineta**. Your decision left it to the discretion of the airlines to modify the ATC agreement to conform to the antitrust laws when antitrust immunity ends on December 31, 1984?

Mr. **McKinnon**. Mr. Chairman, we feel the airlines have the biggest stake in this. It is their money at stake. You can rest well assured they are going to be very, very careful about who they let sell their tickets. It is their money. If they let some fly-by-night operation sell their tickets, and they don't collect their money, they are not going to be very happy. So they are going to be very, very careful before they let anybody go out and sell their tickets.

Mr. **Mineta**. So far as you are aware, have the airlines made any efforts to see whether they can agree to modify the ATC agreement so that it will comply with the antitrust laws.

Mr. **McKinnon**. Well, in the testimony of the record they said they wanted to evaluate things. Since then United Airlines says they can make the necessary adjustments and make things work without the antitrust immunity.

Mr. **Mineta**. Thank you very much.

Mr. Hammerschmidt.

Mr. **Hammerschmidt**. Thank you, Mr. Chairman.

Chairman McKinnon, you have given us a very complete statement. That, along with the chairman's questions, I think we have pretty well covered the subject. But let me just ask one or two more and pursue the same line of questioning the chairman was on. One of the great mysteries surrounding this issue is the extent to which the airline industry has supported the travel agents because of the carriers' fear that the agents would steer consumers away from those carriers believed to be antiagent.

On what fact do you base your opinion that the airline support for H.R. 2053 is due in large part to the carriers' fear of the economic clout of the travel agent community?

Mr. **McKinnon**. Well, I can cite two specific examples about agent unhappiness. One would be, I think it was last year, Frontier Airlines decided they were going to lower their commissions from 10 to 9 percent. Now in a deregulated environment they have competition everywhere they fly. The travel agents didn't like that. They couldn't make as much money at 9 percent commission with Frontier as they could with 10 percent on their competitor so they simply booked around Frontier Airlines until Frontier about 3 weeks later decided to raise their commission back to the 10-percent level.

The travel agents have enormous financial clout. When United Airlines wanted to go to a flat rate based almost like a per piece kind of production, when they went to a per ticket segment booking and were going to give a flat fee to all the agents, the travel agents didn't buy that idea. They didn't like that and they let United know about it very well.

It would have saved United a lot of money in its operation. Eventually it would have saved the consumers a lot of money, because as United raises their fare levels, the travel agents' commissions are also going up, whereas if they provided the work on a per piece basis so to speak it would have remained flat and the savings could have been passed along to the consumers.

Those are two very solid examples.

Mr. **Hammerschmidt**. It is my understanding that during the competitive marketing investigation there was testimony which indicated that travel agents would lose about 2 percent of their business if the exclusivity rule was disapproved. I know you commented on this in your oral testimony, but I have heard also that this estimate has recently been revised upward by ASTA. Would you comment on this?

Has the Board made any independent estimates of how its decision would financially impact the travel agent industry?

Mr. **McKinnon**. We have made no estimates on it, sir. My understanding is the agents say instead of 2 percent loss, they are going to lose about 3.4 percent if our rules continue into effect. As you recall from my testimony, I pointed out that they figure that would be about $70 million on the 2 percent, and the increase in travel agents commissions from 1981 to 1982 was $151 million. So whatever new ideas come along, it appears at least for quite awhile the only effect they are going to have is to slow down the growth of travel agency business.

They are not going to even get involved in reducing the dollar volume, but just slow down the rate of growth.

Mr. **Hammerschmidt**. As you know the CAB's decision in the competitive marketing investigation was not unanimous. The Board's majority was 4 to 1 on the issue of exclusivity, and only 3 to 2 on the issue of antitrust immunity and the status of business travel departments.

Since you were the member who voted differently on these issues, I would appreciate for the record why you believed it necessary to draw the distinctions that you did.

Mr. **McKinnon**. Well, sir, as I analyzed the facts of this case I came to the conclusion that an airline ought to have the opportunity to control its destiny. You men and women in the Congress decided that they should have to go out there and compete. You eliminated all rules concerning their fare and route structure. Their very financial lives are at stake in the competitive process. I felt they ought to be able to have control over their marketing. If they want some new innovative way of selling tickets they ought to have that freedom. The travel agent industry should not be able to stop competition, to stifle an airline's innovative ways of selling its tickets. That is why I voted for the end of exclusivity.

The airlines deserve the opportunity to have freedom for their own future. On antitrust, I voted with the minority on that because as I understood things at that time it seemed to me if you are going to make an error in your decision it would be wise to err on the side of caution or safety just to be sure things would stay in place. Quite candidly as I look at these things after spending an intensive last 6 or 7 months on the subject I have been persuaded quite frankly that I can't see any reason to maintain antitrust immunity, although when I announced the decision at the Board meeting, we made the message very clear to the airlines:

If you can show us any evidence or new facts or anything that would help convince this Board's mind to vote differently on antitrust immunity, we invite you to come back to us, share it with us, we will give you a fair hearing, we will follow through completely and you will get every possible chance to convince us otherwise. But you have got to come back with the facts.

The opportunity is there now. It exists for the travel agency industry to come back and show us any good solid evidence why antitrust immunity needs to be there. The grant of antitrust immunity is extraordinary relief and it requires extraordinary reasons.

Mr. **HAMMERSCHMIDT.** So based on what you have heard since you made that decision, you might very well think otherwise.

Mr. **MCKINNON.** Yes, sir.

Mr. **HAMMERSCHMIDT.** Antitrust immunity is not needed.

Mr. **MCKINNON.** My mind is still open if they have convincing evidence.

Mr. **HAMMERSCHMIDT.** Thank you very much for your response. Thank you, Mr. Chairman.

Mr. **MINETA.** Thank you, Mr. Hammerschmidt.

Mr. de Lugo.

Mr. **DE LUGO.** Thank you, Mr. Chairman.

Chairman McKinnon, I listened with interest to the exchange that you had with Chairman Mineta regarding the many meetings that were held by the Board after the administrative law judge's decision was reached. As I understand it, there was a series of some 19 closed door meetings with staff between August and December of last year to develop the Board's final decision.

Why weren't any of these meetings open to public observation?

Mr. **MCKINNON.** We had oral argument, Congressman. Everybody had their opportunity to present their case. It is like when you meet with your assistants and you want to be able to dig in and have a little bit more of a discussion. These meetings were held individually, maybe there might have been two members present, never more than two, to sit down with their own staff members and other members of the staff to sit and talk about the issues and to get an input. I am not sure when you come to make a decision you can make every single thought you have or every single discussion you make in an open forum. You have to have a little time to sit and think and chew on the facts, and get all the information in and ask people's advice and questions of your staff. I don't see that as you formulate your opinion, once you have got the facts—and everybody has had an opportunity to present you the facts out in the public so there is no ex parte problems—once you have those facts you deserve an opportunity to consider those facts.

Mr. **ANDERSON.** Isn't it also true that if you have a meeting with only 2 members of the Board, are you not then subject to the provisions of the Sunshine Act requiring that it be open to the public? Isn't this the main reason for limiting the meeting to only 2 members?

Mr. **MCKINNON.** That is the reason, Mr. Anderson. But there is also another reason, Congressman. The other reason is it is very difficult to run a collegial body. I want to share with you, you can get quite a few Congressmen together but you can only get two of us together at one time. It becomes very difficult to communicate ideas, very cumbersome and time consuming.

If you have one member and staff goes around and meets with everyone, you have five meetings to accomplish what perhaps you can do in three meetings. It saves a lot of time.

Mr. ANDERSON. I understand that, but most would be led to believe that these meetings were held with only two members because it then wouldn't have to be open to the public, as required by the Sunshine Act.

Mr. MCKINNON. No, the reverse is true. We did not want to have a meeting, so we only had two at a time. We weren't trying to avoid the Sunshine Act. We were trying to expedite the process of getting information.

Mr. ANDERSON. I yield back.

Mr. DE LUGO. Well, Mr. Chairman, isn't it true that in the Board's first public meeting to consider a final decision, held on December 9 of last year, it took you only 1 hour or 2 hours to reach a verdict on the major issues of this case which took 3½ years to litigate and develop a 40,000-page record.

Mr. MCKINNON. I didn't run a timeclock but that is approximately correct. The mere fact the decision was made in opening meeting is testified to by the fact that we made somewhat of an agreement to phase this decision in. Nobody had even thought about that until the open meeting happened where we faced in antitrust immunity for online and then interline after a 2-year period.

That came as a direct result of the open meeting and discussions in that meeting which should indicate to anybody if they have questions that the decision was made in the open meeting.

Mr. DE LUGO. Is it not also true that your staff had prepared a 140-page draft opinion that turned out to be almost completely in accordance with the Board's final decision before the December 9 public meeting at which that decision was supposedly finally made?

Mr. MCKINNON. No, sir. I would like to have our General Counsel share with you exactly the answer to your question.

Mr. MELLUPS. The opinion that was written, finally issued by the Board was 139 pages long. Much of that opinion is factual material, background material, descriptive material, so forth.

Mr. DE LUGO. That is at variance with the final decision that was made?

Mr. MELLUPS. That is not at variance with the final decision, but this is not decisionally critical language but language that is in the order that describes the background, history, and so forth.

Obviously, we did a lot of prework, if you will, George Baranko and others, did a lot of writing in anticipation that there would be a Board decision of some kind. We also had various drafts written of various scenarios of what might occur with a Board decision.

There is absolutely nothing to the supposition that somehow the staff railroaded this Board. There is no way the staff is going to railroad this Board. It just does not happen.

Mr. DE LUGO. Is it true that the Board's instituting order in the CMI was drafted chiefly by the Bureau of Domestic Aviation, which later became an active party in litigating the case?

Mr. McKINNON. That is just a common procedure. You got different people involved in the Bureau and they do not communicate with each other.

Mr. DE LUGO. Then, that is correct. Is it also true that before the order was issued it was reviewed and approved by the General Counsel's Office which later advised the Board in its final decision?

Mr. McKINNON. That is probably true.

I guess I will wait until you get to the punchline here and try and figure out where it leads.

Mr. DE LUGO. Is it also true that the instituting order makes a number of statements to the effect that the travel agency programs appear to be anticompetitive and deter innovation?

Mr. McKINNON. True; yes, sir.

Mr. DE LUGO. Is it not also the case that both the Bureau of Domestic Aviation as staff trial counsel and the Office of General Counsel as an adviser to the Board in reviewing the judge's decision were vigorously opposed to the principal features of the travel agency programs?

Mr. McKINNON. I am not sure that is totally true. There are elements in the General Counsel's Office that were opposed to the judge's decision. As I stated earlier, my effort was to be sure that the Board got both sides of the story, and that is why I had two other expert lawyers at the Civil Aeronautics Board prepare the case and present the opposite viewpoint to the Board so the Board individually, when they would sit down with anybody, would get both sides.

Some of those discussions were extremely lively, not necessarily entertaining but very lively, and it provided the Board members with the opportunity to hear at the same time both viewpoints on this case, to have it argued once again over and over so you could grasp each little detail of this case before you had to make your decision.

Mr. DE LUGO. In light of the way the Board's instituting order was drafted and the subsequent positions taken by the staff, is it not fair to conclude that both the Bureau and General Counsel's Office had to some extent, perhaps to a large extent, made up their minds on key issues before any of the evidence in the 3½-year-long case was submitted?

Mr. McKINNON. I do not have any evidence to that effect, and I want to assure you, Congressman, when the President appointed me to the Board and asked me to serve as Chairman, I came to this town with my integrity, and that is one thing I intend to leave this town with, and this Board or staff or anybody else can present the facts to me, but they are not going to intimidate me on how I make my decisions or vote on this Board, and they did not in this case.

Mr. DE LUGO. I am very impressed by your statement here today, and certainly I am not questioning your integrity. That is not the question here at all. You are very straightforward and seem to be a very forceful Chairman, but is it not true that part of the trial time, through your private deliberations in the case, you asked for input from the Board's Office of Consumer and Community Affairs, in order to give the Board a more balanced presentation from the staff?

Mr. McKINNON. The Director of the Office of Consumer and Community Affairs and his assistant were two of the top lawyers at the Civil Aeronautics Board that were not involved in this case in any way. I assigned them the responsibility of presenting to the Board the opposite viewpoint, because they are excellent lawyers, good arguers, and I felt since they had not been involved in any way in this case, they could be assigned the responsibility of arguing the opposite case, which is what they did, and which the individuals I have discussed here with you.

Mr. DE LUGO. Well, another way of putting that would be that perhaps you felt that the General Counsel's office was presenting too much of a one-sided picture of the case, and yet the Board ended up voting almost completely for what the General Counsel's office recommended, is that not right?

Mr. McKINNON. I do not think we voted exactly what the General Counsel's office recommended, and I am not convinced it was a one-sided argument, either. I will share with you until about the last week, in my own mind, I was for granting exclusivity, but as I analyzed this system and this market and all the facts became available and you had a chance to review and think about them, I became convinced the airlines ought to be able to control their destiny as I have testified here, and that is what convinced me on it. I was the one probably more than anybody that had more questions in his mind, as I saw it at any rate, and still came up to the viewpoint that I did, so there is a lot of vacillating and a lot of analyzing on this. This is a major decision, and we knew it was going to be. You know, unfortunately, I came off wearing the black hat on this as far as the travel agency press goes. All I did was come to town and make one little decision on this which had major ramifications.

Mr. DE LUGO. I understand one of the principal advisers to the Board in this case, an attorney in the General Counsel's office, wrote an article in a legal publication just a few months before the Board issued its decision and in that article he criticized the airlines' policies towards business travel departments and made disparaging comments about travel agencies. This same person was one of the closest advisers to the Board and was the main author of the CMI decision.

Were you aware of this person's actions outside the Board, and if so, why did you not ask that he be relieved of his duties in this case?

Mr. McKINNON. I do not recall when I heard about it, but I heard about it considerably after it happened. I believe it is the policy in most parts of the Government, if people are asked to write stories or comments, that they could do so. We happen to have the man sitting here at the table, so maybe you might be interested in hearing from George Baranko himself exactly how that article got written.

Mr. BARANKO. Mr. Congressman, my article did not criticize air carrier attitudes toward corporations and was not critical of travel agents. The article was written in response to a request that I explain what actions the Board had taken to increase corporate opportunities to negotiate with air carriers to obtain discounts.

Any other characterization of my article is simply incorrect, and I would ask that you read the article, at which time I think you will see that my position is as indicated.

Mr. McKinnon. You might want to even put it in the record at this point, but whatever articles he wrote had no bearing on the decisionmaking process of the members of the Civil Aeronautics Board.

We looked at the facts.

General Counsel.

Mr. Mellups. George presented the article to me for review, as is usual practice of the Board and other agencies, just to make sure there would not be any conflict between that particular endeavor and any responsibilities that he had either in this case or others.

I reviewed it and I made sure I did not see any conflict whatsoever. It was basically a historical review of what the Board itself had done in the past. I saw no conflict between his participation in the case and his having written the article.

Mr. de Lugo. I think it might be useful to include the article in the record, and I ask unanimous consent to do that.

Mr. Mineta. Without objection it is so ordered.

[The article referred to follows:]

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Reducing Corporate Air Transportation Costs

BY GEORGE S. BARANKO

If asked to assess how much he has benefited from the deregulation of the airline industry, the typical business traveler will probably say, "not very much." While air fare levels have moderated, and more discounts are available, the basic coach fare remains the staple in the businessman's budget. More often than not he must travel for brief periods, with little advance notice. He does not have the luxury of planning his trips far in advance and of choosing the day of his flight or the length of his stay. He is the classic nondiscretionary traveler.

It is his counterpart, the vacation or discretionary traveler that probably has benefited most from deregulation. By definition, the discretionary traveler has the freedom, in making his travel plans, to take advantage of the panoply of discount fares that are now available. He can purchase his ticket weeks before he flies, or choose the day of his flight or length of stay to qualify for a given discount.

Of course, fare conditions and limitations are no accident. They were designed to deny low fares to people who must fly. Except for some low cost new entrants, most airlines have tried to segment the air transportation industry on a business/discretionary basis.[1] On the one hand there is the coach fare paid by the large number of a plane's passengers who must fly, usually on business. On the other, there are a number of discount fares for those that will fly only at a good price.

Corporate executives are beginning to wonder, and properly so, if somewhere in the Civil Aeronautics Board's deregulation of the industry there are ways to reduce their travel costs. In fact, new avenues of reducing air travel costs have recently been opened, particularly for domestic air transportation. While the option of contracting with a travel agent to establish a location on corporate premises has been available for some time, it has only recently become popular because of a Board decision permitting the agent to share an employee with the corporation. A second option now available is entering into negotiations with individual airlines for direct price concessions. The Board has now removed the last statutory obstacle to contracts that would set a lower price for corporate travelers because of the efficiencies in corporate/airline transactions. Finally, the Board has explained the circumstances in which corporations can receive price concessions from travel agent intermediaries. This article will examine these three means of reducing corporate travel costs.

Background

Historically, charging corporations a lower price for their air transportation purchases than that charged another traveler has been forbidden by the Board's interpretation of section 404 of the Federal Aviation Act.[2] That section forbids price discrimination in the sale of air transportation. Throughout most of the history of airline regulation the Board construed "price discrimination" to mean a price difference.[3] With few exceptions, everyone flying on a given airplane was required to pay exactly the same fare.[4] By the 1970's, the single "permissible" fare was a mileage based fare in which the Board attempted to ensure that each passenger paid a share of all the costs of operating the airplane, both fixed and variable, under the concept of "fully allocated costs." Discounts were permitted only if a carrier could prove that the revenue generated exceeded revenue diversion from the full fare passenger. Moreover, discounts to selected types of passengers, such as students or

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senior citizens, were generally disallowed. This approach severely restricted price competition, channeled competitive energies into scheduling and inflight amenities and sparked the deregulation movement.

One of the first significant retreats from this highly regulated environment came in 1977 when the Board approved Super Saver fares.[5] The fact that Super Saver fares were the first deep discount fares, of itself, makes them significant. Just as important, however, was the Board's gradual abandonment of the notion that a discount fare could only be approved if it did not significantly reduce the number of passengers paying the full coach fare. Significant differential cost pricing had begun. Air carriers would soon have the freedom to charge different prices to different customers, based on their own conclusions with respect to the cost of providing the particular service and elasticities of demand.[6] Implicit in the Board's decision was its recognition of the fact that a mere price difference does not constitute unlawful price discrimination under section 404 of the Federal Aviation Act.

While airlines were attempting to attract additional discretionary travelers with new low fares, the non-discretionary passenger continued to pay higher coach fares. Even if he could qualify for one or the other of the many discounts that came onto the scene, the business traveler seldom knew enough about air carrier fare practices to ask to be ticketed at the lower price. In fact, few people outside the travel agent community, besides the air carriers themselves, could make their way through all the various fare offerings.

As a result, corporations have increasingly in the last few years turned to travel agents for travel advice. Usually, corporations will deal with travel agents at the travel agent's home offices. The corporation's travel needs are communicated by telephone. The agent then makes all necessary reservations and prepares the tickets. Frequently, agencies are willing to provide ticket delivery services and extend credit to their corporate customers to obtain corporate accounts.

The problem with these arrangements is that the corporate purchaser has no assurance that he is getting the best price. In fact, he knows that it is in the agent's interest to ticket him at a higher price in order to earn a larger commission. Some corporations, which apparently believed this was a significant problem, have switched back to handling their own air transportation and travel bookings. Despite the fact that it increased their travel related costs, they re-established their corporate travel departments and paid a person to keep up to date on air carrier fares, make their reservations, and write their tickets.

In-Plant Employee Sharing

In addition to having an outside travel agent handle one's travel arrangements or having it done in one's own corporate travel department, corporations could contract with a travel agent to establish a branch location on the company's premises.[7] The theory behind the in-plant agency was that having a travel agency on the corporate premises would result in better access to and more convenient travel services.

As of January 1979, however, there were only about a dozen in-plant agencies in the entire United States. The concept had encountered resistance both from the travel agent and corporate communities. Travel agents resisted the lower commission rates air carriers were willing to pay on in-plant sales, generally only three percent.[8] Agents could earn far more by handling corporate bookings at their regular locations. From the corporate perspective, there was little to be gained by going in-plant. There was no financial incentive to go in-plant because the in-plant agent still could not share his commission with the corporation. While having ticketing done on the premises may be more convenient, there was the detriment of having an outsider on the corporate premises. Finally, just as with the use of outside travel agents, there was no assurance that the corporation would be ticketed on the lowest possible fare. This situation was dramatically changed by a Board decision in February 1979.

In Order 79-2-92, February 15, 1979, the Board approved the concept of an in-plant agent compensating the corporation on whose premises it was located for the use of one of its employees. The particular decision involved an agreement between General Mills Corporation and Trans-Mark, Inc., a travel agent located on General Mills' property. According to the agreement, Trans-Mark would use a General Mills employee to handle General Mills' reservations, ticketing and so forth. Trans-Mark was to compensate General Mills for the use of the employee on a pro-rata basis, tied to the portion of the employee's time spent on travel agent business.[9]

The importance of the *Trans-Mark* decision was that it allowed corporations to gain the benefits of both in-house and in-plant travel services, with none of the detriments. Like the corporation with a corporate travel department, the person handling the company's travel bookings would be a company employee, responsible primarily to the company. In addition, he would be situated on the premises to provide convenient services. Unlike the usual in-house operation, however, employing this person would not significantly increase the company's travel costs. The employee's salary would be paid by the travel agent out of the commissions earned on the in-plant sales.[10] In addition, the shared employee oftentimes learned ways to make the travel office more efficient through the association with the travel agent.[11] In sum, the *Trans-Mark* decision gave corporations the means to gain convenient travel services at the lowest available fare.

The Board's decision resulted in a sudden increase in the popularity of in-plant agencies. The number of such agencies grew to 84 by November 1980 and to about 170 currently. It should be noted, however, that it did not actually reduce the basic fare charged business travelers. It did not result in discounts like those available to corporations from car rental companies. Unless the traveler could qualify for one or the other discount fares, he would still be ticketed on high cost coach fares. As such, the opportunity for real fare reduction had not yet presented itself.

Direct Price Concessions

So long as the Board interpreted the words "price discrimination" in section 404 to mean a price difference, few travelers, whether on business or pleasure, got the benefit of reduced fares. As noted above, the door was opened with discounts to pleasure travelers. It swung wide with the adoption of Policy Statement 93 on May 29, 1980.[12] That decision indicated the Board's willingness to accept any price difference for which a reasonable basis was offered and set a very high standard before a domestic fare would be found to be unjustly discriminatory.[13] With very little fanfare the Board had indicated there were very few fares it would not accept. The marketplace, not the Board, would determine fare structure.

Nevertheless, carriers offered virtually no corporate discounts. Perhaps this was because one statutory impediment to price competition remained. All discount fares still had to be filed with the Board. The provisions of section 403 of the Federal Aviation Act still applied.[14] It prohibited air carriers and their agents from charging any person a price for air transportation that did not appear in a tariff on file with the Board. No price not on file could be charged, even though the Board would accept any tariff filing that contained a price below domestic fare ceilings. Charging a fare not on file was still an unlawful rebate.

The issue of whether carriers' tariff filing obligation, and the obligation to abide by filed fares, should be eliminated was placed at issue in the *Investigation into the Competitive Marketing of Air Transportation.*[15] Since Congress had already determined that the domestic filing requirement should end on January 1, 1983,[16] the *Marketing* case would only determine whether the Board should devise a transitional filing policy to ease the change to the new unregulated fare environment. These were later labeled the "pricing issues" of that case.

When the Board issued a regulation modifying the domestic tariff filing requirement, it eliminated the last statutory obstacle to essentially unfettered price competition in the airline industry in the United States.[17] As of October 1, 1981, air carriers are only required to file their unrestricted coach fares with the Board. The filing of all other fare categories is discretionary. In addition, airlines and their agents are free to charge passengers any price below that filed with the Board.[18]

The practical effect of the Board's decision is to eliminate the statutory obstacle to rebating on domestic tickets. Carriers can negotiate fare levels with individual customers and engage in fare experiments as they choose. The fares they charge do not have to be disclosed to the Board or to their competitors, as they would be through the tariff system. The tariff flexibility rule does not, however, require carriers to modify their pricing practices. Carriers may, if they believe it is in their interests, continue to file all their prices with the Board and adhere to them.

In adopting the rule the Board rejected arguments that the elimination of the filing obligation would result in economically unjustified corporate discounts. It concluded there were a number of acceptable cost justifications for price concessions to corporations. Where large volumes of air transportation are used each year, corporations might pay for their air transportation needs in advance at a much lower price. A corporation might also promise to purchase all its air transportation needs in a given market from one carrier. The benefit to the carrier is the same as that of any requirements contract, *i.e.*, the diversion of revenues from other sources of supply. Finally, the Board indicated business travel departments may directly reduce carrier costs by conserving their in-house ticketing resources and saving the expense of additional personnel and ticketing, or by reducing their commission expense on corporate sales.[19]

The elimination of the tariff filing obligation has not yet produced significant discounting on corporate travel. Major airlines appear to be extremely reluctant to negotiate discount contracts with corporations on the grounds that corporate discounting is inherently uneconomic. It has been suggested that any discount will be immediately matched by a carrier's competitors and do no more than decrease industry revenues. The fact remains, however, that the costs of providing air transportation services to one corporation may be significantly different from the costs of providing them to another. It would seem that once different cost elements are identified and quantified, air carriers should be willing to change their policies.

Travel Agent Discounts

The Board's tariff flexibility rule also eliminated the statutory directive that travel agents adhere to fixed prices filed by the air carriers. As a result, travel agents, like the airlines themselves, are free to rebate on domestic tickets and not violate the aviation laws. They can share their commissions, agree to special rates for large customers and attempt to obtain volume discounts by consolidating their clients' purchasing power. This was also a change already scheduled to occur with the elimination of domestic tariffs on January 1, 1983.[20]

Despite the Board's decision, the prospect of discount purchases from travel agents may be more illusory than real. In its decision the Board indicated that airlines are free to require travel agents to adhere to prices they set.

Generally, a producer of goods cannot set the price at which those goods will be resold by an independent retailer. This is because resale price maintenance would limit competition between retailers selling the goods. Airlines, however, do not produce a product they sell to retailers for resale. Airlines provide a service travel agents sell on their behalf. Unlike producers of goods who pass the risk of loss if an item is not sold to the wholesaler or independent retailer, the risk of loss if an airline ticket remains unsold stays with an airline. Moreover, an airline ticket is a contract for travel to be performed by the airline, not the agent who may have sold it. The airline is liable for failure to transport the ticketholder in accordance with its terms. Consequently, the Board concluded that travel agents are, in a legal sense, *bona fide* agents of air carriers and that the so-called "agency exception" to resale price maintenance principles applies.[21]

What this means to corporations, or others who purchase air transportation services from travel agents, is that while there is no longer a statutory obligation to charge a specific price for a ticket, airlines can create a contractual obligation to do so. In this regard, most air carriers have announced that they intend to require their agents to adhere to the prices they set and a number have prepared amendments to the travel agency sales agreements to include a provision requiring agents to adhere to specified prices. The failure to execute the amendments or to abide by its terms will give carriers the option of terminating their relationship with the agency.[22]

In recent weeks some carriers have moved to terminate their relationships with agents that discount.[23] Others, however, may not object to rebating or may not intend to police travel agent practices. Agents would be free to "rebate" on their tickets. They would not be violating their contracts with carriers that have taken strong positions against it if they did.[24] In such circumstances, corporations could approach travel agents to discuss discounts on their domestic air transportation purchases. Some agents may have limited freedom to grant corporations price concessions.

The Competitive Marketing Investigation

While the Board has significantly enhanced corporate opportunities to gain price concessions, some important issues in this area have yet to be decided. In the "Agreements Phases" of the *Competitive Marketing Investigation* the Board is re-examining its approval and grant of immunity from the antitrust laws of agreements among air carrier trade associations that fix the terms under which a person can sell air transportation.[25]

The Board is being asked to disapprove agreements that prohibit the payment of commissions to persons who have not been approved to sell air transportation by the trade associations.[26] It is being argued that members of the trade associations should be free to compensate agents that do not meet the trade association standards, such as corporate travel departments.[27] It is also being argued that the standards are too high. Some parties are recommending that trade association rules be liberalized to permit new persons to qualify as accredited agents, which might include corporate travel departments.

The *Marketing* case is essentially the last frontier on the corporate price concession issue. Most parties agree that if the Board disapproves some or all of the trade association agreements in a way that would permit the payment of commissions to corporate travel departments, it would be a substantial benefit to corporations. With current commission rates at ten percent, the opportunity to earn commissions would reduce corporate air travel costs by that amount. But the Board's decision is several months away. The record on the Agreements Phases is complete and the presiding administrative law judge is now preparing his recommendations. The Board will only begin to consider the extensive record late in the Spring or early this Summer after it receives those recommendations.

Conclusion

In the last three years the Civil Aeronautics Board has removed many of the traditional obstacles to gaining price concessions on air transportation purchases. With the exception of the in-plant employee sharing arrangements, though, corporations have had little success in lowering their air transportation costs. This may be because corporations are not yet aware of the Board's decisions or because they have not had sufficient opportunity to pursue their new opportunities. In any event, it is clear that the old notion that business travelers have no choice about the fares they pay is under attack and its demise is almost a certainty. What takes its place is not likely to be determined as much by the Civil Aeronautics Board as by businesses themselves.

Footnotes

[1] New entrants have generally adopted a time of day and/or a time of week, peak/off-peak pricing structure.

[2] 49 U.S.C. §1374.

[3] *See* Orders 73-8-55, August 10, 1973; 73-5-2, May 1, 1973; and 72-12-18, December 5, 1972.

[4] The fare was calculated on the basis of the mileage traveled, plus a fixed terminal charge. The formula was the result of the *Domestic Passenger Fare Investigation*, Orders 74-3-82, March 18, 1974 and 74-12-109, December 20, 1974.

[5] Orders 77-3-80, March 15, 1977 and 78-4-84, April 14, 1978. Board regulation of discount fares is thoughtfully summarized in PSDR-58, 44 FR 21816, April 12, 1979.

[6] PS-80, 43 FR 39535, September 5, 1978, essentially did away with the cost justification requirement.

[7] Such arrangements were first approved by the Board in 1966. Order E-23754, May 31, 1966.

[8] At the time, regular agency sales were earning more than 7% commissions. Until February 1980, travel agent commissions were fixed by agreement among air carriers. Those "fixed commission" agreements were disapproved by Order 80-2-33, February 6, 1980. Now commission rates are set by individual air carriers. Prevailing rates are 3% for in-plant sales and 10% for regular agency sales.

[9] The contract also provided that General Mills would not receive compensation for the employee's salary in excess of 3% of the in-plant agent's sales. This merely ensured that the employee's salary did not exceed the agency's revenues. The Board also imposed several conditions designed to ensure that corporations did not receive compensation far in excess of the value of the employee's services and that payments could be traced through the corporations accounts.

[10] The Board rejected a proposal that the in-plant pay the corporation rent or the cost of utilities for the location. Order 79-2-92 at 6. It is doubtful, however, that those restrictions remain valid. As noted later in this article, changes in Board policies have in large measure eliminated the obstacles to travel agent discounting. The air carrier trade association that oversees travel agent operations, however, still has a rule that prohibits the payment of rent by in-plant agencies. ATC Resolution 90.3 §XVII.D.1. ATC rules also prohibit employee sharing at non-in-plant locations. ATC Resolution 90.3 §VII.K.

[11] Because a large portion of the in-plant agency's revenues would go toward the shared employee's salary, travel agents actually have less incentive to enter into this arrangement than the normal in-plant agency. However, many travel agents have concluded that shared employee arrangements are worthwhile because they provide access to all the company's employees who frequently will have their own travel demands. In-plant arrangements are useful as a means to channel large numbers of pleasure travelers to the home offices where full commissions are earned.

[12] 45 FR 36058, May 29, 1980, codified 14 C.F.R. 399.36.

[13] An unlawful fare was defined as one that: (a) will result in long-run economic injury to passengers; (b) is in fact discriminatory according to a reasonable cost allocation or other rational basis; (c) does not provide transportation or other statutorily recognized benefits that justify the discrimination; and (d) if it has undesirable discriminatory effects, such effects will not be eliminated by competitive forces.

[14] 49 U.S.C. §1373

[15] Order 79-9-64, September 13, 1979.

[16] 49 U.S.C. §1551(a)(2).

[17] Economic Regulation 1246, 46 Fed. Reg. 46787, September 22, 1981. *See also*, Economic Draft Regulation 427 and Order 81-7-108, 46 Fed. Reg. 38642, July 28, 1981.

[18] By Order 81-12-112, December 12, 1981, the Board specifically declined to make similar changes in carriers' filing obligations in international markets.

[19] Order 81-7-108 at 18. Even if a carrier attempted to grant corporations discounts beyond those that would be economically justifiable, the Board concluded they would be eliminated by the market forces. *Id.* at 19. The Board only found that the cost of providing transportation to corporate travelers might be lower than the cost of providing transportation to other travelers, not that the cost is, in fact, lower. Some persons argue that the cost of providing air transportation services to corporate customers is actually higher because they demand more frequent flights and travel at peak times.

[20] Order 81-7-108 at 17.

[21] Order 81-7-108 at 7, *citing Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) and *U.S. v. General Electric Co.*, 272 U.S. 476 (1926). The Board noted, however, that the exception probably would not apply where an agent has assumed the risk of loss for a ticket, as agents do with contractor bulk fares.

[22] An individual air carrier terminates its relationship with an individual agency by withdrawing its validation plates from the agency's locations. The validation plates are given to an agent after it is approved by the air carrier trade association and is used to transform blank ticket stock to individual carrier stock.

[23] *See e.g., Aviation Daily*, February 10, 1982, at 212.

[24] The Board has specifically foreclosed joint carrier action in determining whether to afford travel agents pricing freedom or joint action enforcing individual carrier policies on that issue. Order 81-9-167 at 2, September 30, 1981.

[25] The Air Traffic Conference of America (ATC) is the domestic air carrier trade association. The International Air Transport Association (IATA) is its international counterpart.

[26] Such provisions are referred to as the "exclusivity" provisions.

[27] These arguments are being made by the Department of Justice and the National Passenger Traffic Association, among others.

Mr. de Lugo. No further questions.

Mr. Mineta. Mr. Anderson.

Mr. Anderson. Thank you, Mr. Chairman.

I too want to join you in welcoming our fellow Californian here today, in this case, a southern Californian. I do not know whether all the members of the subcommittee are aware of this but Chairman McKinnon's father was a Congressman here some years back and was a very close friend of mine. Dan, I know that he would be very proud of your performance before the subcommittee today.

Mr. McKinnon. Thank you, Mr. Anderson.

Mr. Anderson. I do have a couple of observations.

Earlier today, you mentioned the air carriers' fear of retaliation from the travel agents. I have here a document relating to the differences between the air carriers and the travel agencies during the 1970's. As I thumb through it, I see that there must be 300 or more instances where the travel agents position was completely ignored and rejected. The travel agents must have been turned down 90 percent of the time. It does not give me much of an impression that the ATA is terribly fearful of the ATC.

Mr. McKinnon. Of course, that is in the seventies.

Mr. Anderson. We are only 1983 now. This is up through 1979.

Mr. McKinnon. The airlines came up with deregulation in 1978. This particular decision and the commissions of travel agents is the very lifeblood of the airlines. I am not familiar with all of the things that they were turned down on.

Mr. Anderson. Everything from their operation, to bonding is listed.

Mr. McKinnon. Collectively the airlines can sit and tell ASTA to go fly a kite. When you get down to them individually it is a little bit hard to do that when ASTA has control of your financial destiny. They sat there together and said sure, we are not going to do that. In this particular case they have got to say individually no, and the minute they do, somebody has to be first, and whoever is first is going to suffer.

I had one airline president come to me right after this decision, and he will be nameless, he told me, "Boy, it took a lot of guts to do that." And I have had several others tell me the same thing. There are a couple of airlines, and if I was head of those airlines, I would not be too excited about this decision, and that is United and American. They dominate the computer reservations system. The travel agents are their best sales representatives, and since they have the bias that they currently have, it serves their best interests to keep the agencies right in the system they are in right now. Because of their computer reservations systems, they can dominate the booking, ticketing of the air travel in this country as it came out in previous hearings. If you should get either one of those airlines to testify, they will stick up for travel agents.

There are other airlines that want to get away from that and have the freedom to have new innovative ideas come along. When you told the airlines you were going to deregulate them, you said we are going to deregulate your freedom for pricing and routes. What we did with the travel agents, early on we gave them freedom of pricing, commission flexibility. Their commissions went from 7 to 10 percent, an increase of 42 percent.

We did not take the other half of the pill which means, if you are going to get the freedom of adjusting your prices, the entry side of it ought to also be flexible, because if nobody else can get in the ball game, and you have the freedom to raise your prices up and down, eventually the airlines can suffer from that. This is the other half of the coin, so to speak. They got the sweet part of it first and this is sort of the bitter part from their viewpoint, and now it is complete.

Mr. ANDERSON. Under the great leadership of our chairman and his right arm Mr. Hammerschmidt, I am confident that we will not have to worry about computer bias in the industry in future years.

Mr. MCKINNON. I got a letter from both of them recently, and I can share with you that the Civil Aeronautics Board is going to take some action on that. I intend to schedule something on the August 11 meeting to discuss the issue and figure out what action we are going to take.

Mr. ANDERSON. Mr. McKinnon, don't you agree that a BTD is a customer rather than an agent of the airline, whose primary purpose is to purchase air transportation for its corporation and not for the traveling public?

Mr. MCKINNON. I would agree with you on that, Congressman.

Mr. ANDERSON. Isn't it true that even before the Board issued its final decision in the CMI, the BTD's had the right to negotiate with any airline for compensation reflective of BTD's ticketing services?

Mr. MCKINNON. They could negotiate the right for discounts, not commissions.

Mr. ANDERSON. Isn't that what the BTD's want, the ability to negotiate with the airlines for compensation?

Mr. MCKINNON. Yes, sir, but they also want the freedom to have the compensation be either a discount or a commission.

Mr. ANDERSON. Before you made your CMI decision, any carrier that was willing to do so could agree to pay BTD's compensation in the form of discounts off the air fare of their tickets without violating any rule of the ATC program.

Mr. MCKINNON. Yes, sir.

Mr. ANDERSON. Yet the Board's decision will in practical effect force the airlines to include BTD's in the travel agencies' programs as of 1985?

Mr. MCKINNON. No, sir, I believe it gives them the option to. It does not force them to and if a BTD and an airline want to get together and negotiate it, that is fine. If the airline doesn't want to make a deal with them, that is fine, too.

Mr. ANDERSON. Do you believe an airline will have the option to say "no" to a BTD and not be subject to a lawsuit?

Mr. MCKINNON. My guess is they will say no. A business travel department is an organization that handles travel of people that have to go on business for a particular company.

The airlines know that those travelers are pretty much of a captive audience so there isn't quite the incentive by giving up those travelers by giving in on extra commissions. They can keep a stiffer back here than they can in a lot of other instances.

Mr. ANDERSON. Since BTD's have the right to bargain with the airlines and would not have any intention to serve the public, why does it make sense to include them in an agency program whose major purpose is to sell air transportaiton to the public. In making their decision to include the BTD in the travel agency program, did you estimate the costs which would be imposed on the airlines and of course, the public due to the increased commission expenses paid to the BTD's?

Mr. McKINNON. There is no way to estimate that cost because there is no sure way of knowing that there will be any cost at all. There is the opportunity for cost or payment but it is not a guaranteed situation so there is no way to estimate what that would be.

Mr. ANDERSON. I happen to have a copy of the August 1983 edition of the U.S. News & World Report.

It contains an article entitled, "Expense Account Living Costlier Than Ever." It states that since forming its in-house travel agency, Champion Spark Plug Co. in Toledo has cut its hotel costs 10 percent, rental car costs 5 percent and the cost of commercial airline tickets up 50 percent.

Wouldn't you agree that is a pretty good cut on their airline tickets?

Mr. McKINNON. There could be a lot of ways that could happen. They might keep all their employees from traveling first class and send them coach. That would save a substantial amount of money right there by controlling it. Have the company control the travel. Select airlines with lower fares than higher fares that go to the same destinations.

Mr. ANDERSON. This is an article talking about commissions, when dealing with the airlines. It doesn't say how this cost was achieved. It simply says that the cost of commercial airline tickets was cut up to 50 percent.

Mr. McKINNON. There are different options on the way you buy your ticket and the way you go and how you could cut costs.

Mr. ANDERSON. I feel that if huge multi-million dollar corporations can get special rates and save up to 50 percent on airline tickets for their employees, then somebody else—probably the infrequent traveler—will have to pay a lot more for their ticket. Someone, obviously, will have to pick up the tab and it just doesn't seem equitable.

Mr. McKINNON. Yes, sir, but when people go under what is the current system now, the current system being identified as post-CMI, some people want to go from point to point. It doesn't take much effort to do a point-to-point ticket.

If somebody wants to fly to Europe, travel on Eurail and all that type of thing, it takes more time and effort to put that together. Should the person that is taking a little dinky trip, one segment, have to pay the same commission as the person taking this long trip? The person taking the short trip is subsidizing the person taking the long trip the way the commission is structured.

You will pay for what you get. If you don't require much of the travel agent's time, the airline is going to lower the ticket cost eventually, so you don't pay for as much.

Right now, there is a subsidy from the point-to-point versus the complicated ticket.

Mr. ANDERSON. Thank you, Mr. Chairman.

Mr. MINETA. Well, Mr. Chairman, you have exhausted us.

You have done a fine job in the terms of your testimony you have given us as well as your frank and candid responses to the inquiries and I wish to thank you again.

Mr. Hammerschmidt?

Mr. HAMMERSCHMIDT. I, too, want to join you in thanking our very distinguished chairman of the CAB for being here. We appreciate all the other members being here.

Mr. McKINNON. We certainly appreciate your commitment and skill and expertise in analyzing all these subjects.

Mr. MINETA. Prior to your leaving the table, the witness table, if I might use the chairman's prerogative to introduce your mother.

Mr. McKINNON. My mother Lucille McKinnon is here, and my wife Janice and my daughter Sherri works as an "extern." An intern gets paid and the extern gets experience in the office of the Chairman of the FCC this summer.

Mr. MINETA. Thank you again very much, Mr. Chairman.

I am pleased to call forward the Honorable Franklin K. Willis, Deputy Assistant Secretary for Policy and International Affairs from the Department of Transportation.

The full text of your prepared statement will appear in the record at this point.

[Statement referred to follows:]

STATEMENT OF FRANKLIN K. WILLIS, DEPUTY ASSISTANT SECRETARY FOR POLICY AND INTERNATIONAL AFFAIRS, DEPARTMENT OF TRANSPORTATION

Thank you Mr. Chairman. The Department certainly appreciates the Subcommittee's granting us this opportunity to testify on H.R. 2053. We believe this proposed legislation may have adverse consequences in terms of public policy implementation and competition in the commercial air transportation industry.

I think it would be helpful to give a short history of the Department's views on this issue in order for the Committee to understand more fully our objections to this proposal.

When the Civil Aeronautics Board in 1979 set down for investigation the intercarrier agreements which created the existing system for marketing air travel, both domestically and internationally, it did so within the framework of the pro-competitive mandate of the Airline Deregulation Act of 1978. In the ADA, Congress established a new standard by which the CAB must judge the propriety of carrier agreements that have the potential for limiting competition. This new standard requires the Board to find that any agreement which might substantially reduce or eliminate competition must meet a serious transportation need and that no less anticompetitive alternative is available to meet that need.

The CAB competitive marketing investigation (CMI) was constructed to examine five major issues: (1) the general system of common accreditation; (2) specific accreditation provisions which prevented certain entities such as business travel departments from qualifying as accredited agents; (3) the so-called "exclusivity provisions" which prevented carriers from paying compensation to anyone but an accredited agent; (4) the area settlement plan, which created a uniform system within which agents could settle accounts with carriers; and (5) the continued need for antitrust immunity.

From the start, the general system of common accreditation and the area settlement plan were strongly supported by most parties and approved nearly intact by the CAB. Under great debate, however, were, first, the provisions which prevented other types of potential retailers from becoming accredited agents; second, the exclusivity provisions; and, third, the need for antitrust immunity for those agreements.

Several of these provisions, separately and in tandem, acted to diminish competitive entry into the air travel marketing industry. First, certain of the accreditation standards unreasonably prevented otherwise qualified applicants from becoming travel agents. Requirements like the 20-percent rule which prohibited an agent from doing more than 20-percent of its business with itself, and the location rules which required that agents' offices be open full-time and be available to the public, prevented organizations like corporate business travel departments (BTD's) from qualifying as accredited agents. Similarly, the exclusivity rules prevented the carriers from paying compensation to anyone but an accredited agent, thus eliminating many potential forms of retailing.

The Department of Transportation's position in the CMI was to urge the disapproval of a number of accreditation restrictions which we concluded unnecessarily limited the variety of retail outlets available to the traveling public. Specifically, we noted that the elimination of the 20-percent rule and the location rule would permit additional competition.

The department also opposed the exclusivity provisions which effectively foreclosed the non-carrier marketing of air travel to all but accredited agents. We argued that greater competition among carriers in the manner in which they marketed could expand the variety of retail outlets and result in cost-savings to carriers, which, in the newly competitive aviation industry, could result in the passing on of lower ticket prices to consumers. While we strongly supported a conference system of common accreditation, it was our view that its benefits were not premised on the exclusion of all other methods of marketing.

DOT also supported continuation of the area settlement plan. Finally, we advised the Board to continue to grant antitrust immunity to those carrier agreements which the Department believed were necessary for the continued smooth functioning of the system.

After three years of hearings and analysis of submissions, an intermediate recommendation was reached by a CAB administrative law judge. Judge Yoder recommended approval of the entire system of common accreditation and the area settlement plan, which was in accordance with the Department's views. He found, however, that competition might produce a less desirable marketing system than the industry has today, and thus recommended continuing the "agency exclusivity" provisions—that is, continuing the requirement that any retailer acting as an agent for a carrier must be accredited by the U.S. Air Traffic Conference or the International Air Transport Association. Further, the ALJ would have continued the accreditation restrictions which had prevented other types of distribution channels from qualifying as accredited agents. Finally, the ALJ's decision would have immunized all approved agreements from the antitrust laws.

The CAB chose a different course. The Board approved the agreements which governed the basic framework of the existing travel agent accreditation system and the area settlement plan. It disapproved, in a phased timetable, the exclusivity provisions and the disputed accreditation rules.

The Board also found that the agreements which it approved (that is, those governing the general accreditation program and the area settlement plan) were basically not anticompetitive and therefore, did not require a continuing grant of immunity. Nevertheless, to allow carriers and agents time to adjust their relationships with one another, the Board continued the existing immunity for two years with the intention of reviewing it once more before its expiration.

Although the Board's order differed from the Department of Transportation's recommendation on the antitrust immunity question, it basically followed what we outlined in our pleadings as the proper competitive track for marketing in the industry. Indeed, the Department had recommended that increased competition be put on an even faster track by immediate disapproval of both the exclusivity provisions and those provisions which limited the types of outlets which could be accredited.

The Department believes that the direction and thrust of the CAB decision was correct and in harmony with the Airline Deregulation Act of 1978. It follows directly from the clear policy directives of the statute that, absent a showing that competition cannot work, the air travel industry should be opened to the operation of market forces.

Some may argue that opening up the existing system will bring no real benefits. The important fact is that government has no business protecting one class of competitors from other classes of known or unknown competitors. DOT does not support or oppose particular marketing alternatives. We look to the marketplace to make those decisions and oppose H.R. 2053 because its practical effect would prevent that dynamic.

The Department recognizes the value of the existing conference system, but does not believe that the system will self-destruct if agency exclusivity is disapproved. It is in the airlines' and travel agents' interests to maintain standards for the distribution network that consumers can have confidence in. There will continue to be a large market for full spectrum, full service, interline retail outlets. It makes economic sense for the carriers to maintain and participate in such a system, despite the existence of marketing alternatives. If the exclusivity requirement is removed, the use of alternatives is wholly permissive—not mandatory. Carriers do not have to enter into any other type of relationship; if they do, it will not bear upon the conference relationship already established. There simply is no nexus which inextricably bonds exclusivity to the continued operation of an air transportation retailing system.

It is our belief that the effects of this legislation would be antithetical to the procompetitive goals established for the passenger air transportation industry in the ADA. The CMI record offers numerous, unsubstantiated fears and conclusory statements that competition will produce a less desirable marketing system. Those unsubstantiated fears are simply insufficient to justify a continuing grant of antitrust immunity to the anticompetitive, exclusivity provisions of a generally sound conference system which will in large part continue effectively without them. Nor do these fears justify the creation, through this legislation, of a statutory exception to our economic system's central organizing principle of reliance on competitive market forces.

At any rate, the Board's decision has granted the industry a grace period for coming to terms with the end of antitrust immunization of carrier and agent agreements. We believe the commercial aviation industry, agents and airlines alike, is naturally a highly competitive industry which is flexible and innovative enough to respond to all of the challenges of a marketplace that is driven by market forces—not government regulations.

The Department believes that the final order of the CAB should be permitted to remain in effect and that no legislation should be adopted. While the Board's order did not adopt all of the Department's pro-competitive recommendations, it did establish a framework and phased-timetable to introduce effective competition in the passenger air transportation market. Forebearing from enactment of this legislation and allowing the Board's order to go into effect will preserve those aspects of the ATC/IATA conference system which maintain the benefits of common accreditation, and at the same time properly bring the marketing industry into alignment with the principles which govern the rest of American business practices.

That concludes my formal statement, Mr. Chairman, but I will be pleased to answer any questions which you or the other Subcommittee Members may have.

Mr. MINETA. Please proceed.

TESTIMONY OF FRANKLIN K. WILLIS, DEPUTY ASSISTANT SECRETARY FOR POLICY AND INTERNATIONAL AFFAIRS, DEPARTMENT OF TRANSPORTATION, ACCOMPANIED BY SUSAN McDERMOTT, OFFICE OF GENERAL COUNSEL AND ROSALIND K. ELLINGSWORTH, OFFICE OF INTERNATIONAL POLICY AND PROGRAMS

Mr. WILLIS. Thank you, Mr. Chairman.

The Department of Transportation certainly appreciates being before the subcommittee and having this opportunity to give you our comments and testimony.

I would like to follow your suggestion and submit my prepared remarks for the record, and simply summarize a few of the key points.

Mr. MINETA. Without objection it is so ordered.

Mr. WILLIS. With me on my right is Susan McDermott of our General Counsel's Office, and on my left, Rosalind Ellingsworth of the Office of International Policy and Programs of the Department of Transportation.

The Department believes this proposed legislation will have adverse consequences. I think it would be helpful to give a short history of the Department's views on the issue of competitive marketing of air transportation in order for the members of the committee to more fully understand our objections.

DOT's position in the CAB's competitive marketing investigation was to urge the disapproval of a number of accreditation restrictions which we concluded unnecessarily limited the types of retail outlets available to the traveling public.

We also opposed the exclusivity provisions which effectively foreclosed the noncarrier marketing of air travel to all but accredited agents.

In this respect, we argued that greater competition among carriers in the manner in which they marketed could expand a variety of retail outlets and result in cost savings to carriers which could be passed on to the traveling public. While we strongly supported a conference system of common accreditation, it was our view that the benefits of this system are not premised on the exclusion of all other marketing methods.

DOT also supported continuation of the area settlement plan.

Finally, the Department advised the Board in our filings to grant antitrust immunity to those carrier agreements which we believed were necessary for the continued smooth functioning of the system. In particular here, we are referring to the accreditation standards including the bonding and experience provisions and the area settlement plan.

The Board's decision basically followed the Department's position on the proper competitive tract for marketing in the industry.

We believe that the direction and thrust of that decision is correct and in harmony with the Airline Deregulation Act of 1978.

It follows from the clear policy directives of the statute that, absent a showing that competition can not work, the air travel industry should be open to the operation of market forces.

The value of the existing conference system is recognized by the Department, but we do not believe the system will self-destruct if agency exclusivity is disapproved. It is in the airlines' and travel agents' best interests to maintain standards for the distribution network that consumers have confidence in. It is our belief that the effects of this legislation would be antithetical to the procompetitive goals established for the passenger air transportation industry in the Airline Deregulation Act.

No expressed fears that competition will produce a less desirable marketing system have in our view been substantiated and those unsubstantiated fears do not justify the creation of a statutory exception to our economic system's central organizing principle of reliance on unfettered competition.

We believe the commercial aviation industry, agents and airlines alike, is naturally a highly competitive industry which is flexible and innovative enough to respond to all of the challenges of a marketplace that is driven by market forces rather than by Government regulation.

In short, Mr. Chairman, the Department believes the Board's order should be allowed to go forward on its phased timetable with a review before antitrust immunity is terminated at the end of 1984.

Thank you. That summarizes my remarks and we will be pleased to take any questions the committee may have for us.

Mr. Anderson [presiding]. Mr. Hammerschmidt.

Mr. Hammerschmidt. Mr. Willis, we appreciate your testimony. The travel agent associations have said that the system of common accreditation of travel agents authorized in the Air Traffic Conference, and agreements would be in jeopardy if antitrust immunity was no longer provided.

Although the CAB specifically approved common accreditation and believes it could survive without immunity, what would your reaction be to continued antitrust immunity without the exclusivity provisions?

Mr. WILLIS. In our submissions in the proceeding, we recommended that antitrust immunity be continued for the accreditation agreements and for those other agreements that should receive approval. That was our position in the case.

We have felt that what the Board did was for the most part, responsive to that position. That view has, in our minds been confirmed by several statements of Chairman McKinnon in his testimony, namely, that the question of antitrust immunity will be reviewed in the event that any parties to the proceeding or others feel that a case can be made that antitrust immunity should be granted.

We think that what the Board has done, and we did not ourselves conceive of, nor offer the idea of a phase-in as they adopted, is provide for a period of time in which we can focus on changing events, and that the time and the procedures are available to make that case in front of the Board in the event the parties wish to do that. We support that entirely.

Mr. HAMMERSCHMIDT. Recently this subcommittee held hearings on the computer reservation systems used by travel agents.

I think it is fair to say that as a result of those hearings, there was reason to be concerned about the bias inherent in many of these systems, and the potential for abuse.

Do you believe that the bias in CRS's has any bearing on the exclusivity issue before us today?

Mr. WILLIS. We did not testify in the bias case that was before the committee. We have been following that issue generally at the Department of Transportation, recognizing that the immediate duty with respect to action in that case falls either with the Department of Justice or with the Civil Aeronautics Board, depending on the particular steps that those agencies choose in the case.

As a consequence, our position has been a more general one of observation rather than one of taking a particular Department position at this time.

Mr. HAMMERSCHMIDT. It has been suggested that since the travel agents have enjoyed many of the benefits associated with airline deregulation, in other words, higher commissions, more sales, substantial industry growth and so on, it is only fair that they be forced to compete as the airlines have been required to do.

However, the agents have stated that there is, in fact, vigorous competition among accredited travel agencies and that removal of the exclusivity rule is, therefore, not needed.

Would you comment on the extent to which competition does exist today and whether the added competition would result from the CAB's decision is worth changing the current system for?

Mr. WILLIS. We think that there is some competition in the system today and Judge Yoder's recommended decision moved again further in that direction.

Nonetheless, we do not believe in the new deregulated airline industry that even the restraints that arise out of the existing system or that arise to a somewhat lesser degree in Judge Yoder's decision are justified.

We think that they should go into a fully competitive regime and that exclusivity should be dropped.

We fully supported that position in our submissions to the Board, and the decision of the Board took that position.

Mr. HAMMERSCHMIDT. The CAB has contended that the airline industry support for H.R. 2053 is based in large part on a fear of agent retaliation. In other words, agents would steer customers away from those airlines if certain airlines came to be identified as antitravel agent. Have you noticed any evidence of this?

Mr. WILLIS. Our thinking in large part about the airlines' position is that it arises out of, on the one hand, a great deal of faith in the travel agent system that exists and a great deal of confidence that the system is able to distribute the product of the airlines in an efficient and cost effective way.

But it also results from a concern that, with the withdrawal of antitrust immunity, carriers may be vulnerable to antitrust lawsuits if they attempt to enforce provisions of those agreements. There may be other driving factors, but we think at the heart of airline concerns are questions about what the withdrawal of antitrust immunity means to a system that they felt and continue to feel has worked effectively in marketing their product.

Mr. HAMMERSCHMIDT. Thank you for your responses.

Thank you, Mr. Chairman.

Mr. MINETA [presiding]. Mr. Anderson.

Mr. ANDERSON. Thank you, Mr. Chairman.

Mr. Secretary, when the Department of Transportation took its position before the CAB on the CMI, you opposed the so-called exclusivity provisions, didn't you?

Mr. WILLIS. Yes, we did.

Mr. ANDERSON. Is that the Department of Transportation's position now as well?

Mr. WILLIS. Yes, it is.

Mr. ANDERSON. Before the CAB you also opposed the so-called BTD rules, the 80/20 percent rule, and the self-dealing rules.

Mr. WILLIS. Yes.

Mr. ANDERSON. Is that still the Department of Transportation's position?

Mr. WILLIS. Yes.

Mr. ANDERSON. Your position basically was that those rules are anticompetitive, and before the CAB you supported approval for the area settlement plan. Do you still maintain that view?

Mr. WILLIS. Yes, we do.

Mr. ANDERSON. But as to the area settlement plan, the Department of Transportation said that the standard 7-day remitting cycle was a "serious anticompetitive feature."

I gathered you favored approval nonetheless because you concluded at the present time at least there was no anticompetitive alternative available. Is that the essence of it?

Mr. WILLIS. Yes. That is it.

Mr. **Anderson**. Now, when you got to the antitrust immunity issue, the Department of Transportation favored the continuation of immunity to the programs including the area settlement plan, after they were modified as you had recommended.

That was your position, and you have not changed this position, assuming that the exclusivity and BTD rules are not restored?

Mr. **Willis**. As noted in our submissions, we thought that there was a basis for continuing the antitrust immunity.

It is in that portion of the decision that I think I mentioned in my answer to Congressman Hammerschmidt that we feel the Board went part way in our direction and procedurally established a framework in which the position we put forward will continue to be evaluated.

The comments by Chairman McKinnon just a few moments ago before this subcommittee underscored that point in our mind when he, on two separate occasions, indicated that if there is a case to be made for antitrust immunity, he wanted to hear it and he wanted to hear it next year before the 2-year period of the phaseout has elapsed.

We think that with that framework, and given the concerns and points that have been made in this area, that the antitrust issue will be placed in front of the CAB and thoroughly revisited. In that sense, we think that the Board has been responsive to both the general concern and the particular points the Department raised in the proceeding.

Mr. **Anderson**. Getting back to my question, has the Department of Transportation changed its position on the immunity issue, assuming that exclusivity and the BTD rules are not restored?

Mr. **Willis**. No.

Mr. **Anderson**. Your submissions to the CAB in support of immunity were based on the belief, even as modified, the agency programs would invite antitrust lawsuits over the standards and possibly against the area settlement plan; isn't that right?

Mr. **Willis**. Yes.

Mr. **Anderson**. Does the prospect of such suits raise a concern for you about the fate of the programs?

Mr. **Willis**. I am not sure I would go so far as to say that it raised a concern about the fate, because I think that the accreditation standards and the other kinds of agreements we felt should be approved would stand the test of the rule of reason under the operation of the antitrust laws and litigation that would follow from it. So I would state our position as saying that antitrust immunity was not required to keep that system, as modified, in place, but we still thought there was justification for the grant.

Mr. **Anderson**. Well, as I understand your position, the threat of antitrust suits would exist as to the settlement plan, even if the exclusivity and BTD rules continue to be disapproved as you have recommended. Is that correct?

Mr. **Willis**. I am sorry, Congressman. I missed the question.

Mr. **Anderson**. The threat of antitrust suits would exist as to the settlement plan, even if the exclusivity and BTD rules continue to be disapproved as you have recommended?

Mr. **Willis**. Yes, I not only believe that, but I think the Justice Department has also indicated questions in this area.

Mr. ANDERSON. You favor antitrust immunity for the area settlement plan [ASP] regardless of how the other issues are handled?

Mr. WILLIS. We feel that there is a case to be made in front of the Board in its continuing review of its decision, and that that review ought to take place. The case ought to be made for it and the Board ought to sit in judgment of that case with the counterarguments.

You know where we stand.

Mr. ANDERSON. Suppose for example the Congress decided that in order to protect the public and avoid confusion among the types of agents required that Judge Yoder's decision be replaced with the Board's decision with respect to exclusivity. In these circumstances, would you agree that the threat of antitrust litigation is even greater, and therefore, it would be even more important to confer antitrust immunity on the programs?

Mr. WILLIS. I may have missed the thrust of the question.

If the thrust of the question is that you need antitrust immunity in order to maintain exclusivity, and if it was the decision of the Congress that exclusivity should be maintained, then I would say yes, you would have to grant immunity.

You would mandate the exclusivity to take care of the antitrust issue or tell the Board that they must impose the immunity, but if you don't impose the immunity, the exclusivity part won't stand the test against antitrust laws.

Mr. ANDERSON. Suppose Congress did not believe it should compel adoption of Judge Yoder's decision as to exclusivity, but did agree with him that BTD's should not belong in the agency programs. What would your view on immunity be then?

Mr. WILLIS. As a general proposition, I think that we would have difficulty with the idea that you ought to tell the agency to give immunity.

At a minimum, you produce a very complicated situation legally because on the one hand you mandate immunity for a discrete issue. On the other hand, the agency has a general responsibility whether to grant immunity or not with various issues that come before it. To the extent that, where Congress has mandated antitrust immunity a conflict is created in what would otherwise be a neutral approach to an issue by the agency, I am not sure what the agency does.

I think the agency has two different directives from you, in one case mandating immunity for one discrete issue, and in another to respond to the general test whether to give antitrust immunity. So you have a terribly complicated situation legally.

On a more general level, we think what Congress has done under the Airline Deregulation Act makes sense to date; you did some fine tuning of the antitrust provisions that we thought made a lot of sense in establishing more clearly the rule of reason and the kind of analysis that the Board should apply to cases of request for antitrust immunity, and we think the new provisions function in a sensible way.

You have got an agency that provides the oversight and makes those decisions, and that general approach should be retained.

Mr. ANDERSON. If the Congress restored both exclusivity and the BTD rules to the programs, wouldn't the threat of antitrust suits be greater than under the Board's decision?

Mr. WILLIS. I absolutely agree with that, and if you did not mandate antitrust immunity in that case, you would have to give a directive to the Board to assure that those kinds of agreements were cloaked with antitrust immunity.

Mr. ANDERSON. One other area. The Department of Transportation took a rather strong position on the international issues in the CMI. Did you coordinate that position with the Department of State?

Mr. WILLIS. I would like to say that on international issues generally, we coordinate with the State Department. I cannot recite for you the specific steps that were taken, but we did at a staff level have a coordination of our position.

Mr. ANDERSON. Is it the position of DOT and the State Department that the CAB decision would be detrimental to the U.S. interests and consumers with regard to the IATA programs? And didn't the State Department share your view that antitrust immunity should continue to be allowed to insure that the programs are not destroyed by potential lawsuits?

Mr. WILLIS. We are still coordinating with them on that.

Mr. ANDERSON. The Domestic Conference Airlines have recently filed new agreements with the CAB to try and comply with the Board's decision, pending the outcome of Congress review.

Did the Department of Transportation take a position before the Board on those new agreements?

Mr. WILLIS. We have not yet, no.

Mr. ANDERSON. Why not?

Mr. WILLIS. At the moment, they have immunity, and what they are doing with their new approach is to try to adopt procedures that will conform with the thinking at the Board.

For the immediate future except for the one phased-in area, which is the intraline ticketing, the one-carrier ticketing, I don't think we thought it was a major problem. We do see some dark clouds on the horizon.

Mr. ANDERSON. Wasn't this filing of the new agreements accompanied by a renewed request for antitrust immunity, in accordance with DOT's earlier position before the Board?

Mr. WILLIS. Yes; and that has been a consistent position they have taken with us not only as reflected in that filing but also in representations they have made to us, including to me personally this morning.

Mr. ANDERSON. Thank you, Mr. Chairman.

Mr. MINETA. Do you think that interlining and baggage agreement can survive without antitrust immunity?

Mr. WILLIS. Yes.

Mr. MINETA. It is my understanding that there are many airline baggage and interline agreements in existence today that do not enjoy immunity such as the U.S. Air/Allegheny Commuter agreements, so I take it, then, that these kinds of agreements seem to still exist without that immunity.

Mr. WILLIS. There is a vast array of agreements out there that survive without a grant of immunity, such as uniform procedures on what the baggage checks should look like.

They don't pose any significant question of antitrust immunity, and they, in our view, don't concern industry particularly either.

Mr. MINETA. I have supported legislation in the past that would transfer the authority to grant antitrust immunity to airline agreements to DOT in 1985. I continue to support that approach.

In H.R. 2053 there is policy guidance for the granting of antitrust immunity to certain types of agreements. Is this guidance necessary or desirable?

Mr. WILLIS. Well, there is already the basic guidance of the existing provisions of the Airline Deregulation Act which is guidance that we have received from you as recently as 1978. In the event of a sunset and a transfer of the antitrust immunity provisions to the Department of Transportation, that guidance then would apply to us as it has up until now to the Civil Aeronautics Board.

We think that the standard that you have in the Airline Deregulation Act is satisfactory and sufficient. That is not to say that we couldn't live with additional guidance. We just wonder if there isn't sufficiency already.

Mr. MINETA. Though the CMI decision has been derided for the radical changes that it forces on this industry, it could be argued that the CMI decision is actually a conservative approach. Rather than saying the airlines could not participate at all in Air Traffic Conference agreements, CAB has allowed the essential elements of the present system to survive while the inevitable changes being wrought by technology and marketplace are being accommodated. What is your reaction to this argument?

Mr. WILLIS. We would agree with that statement.

Mr. MINETA. You state in your testimony that the Department believes that the final order of the CAB should be permitted to remain in effect and that no legislation should be adopted. Is that correct?

Mr. WILLIS. That is correct subject to one modest modification. It is not really a modification but an elaboration of their decision which, as Chairman McKinnon said, involves an element of a review next year on the antitrust question. We think that needs to be further evaluated.

Mr. MINETA. If the provisions of H.R. 2053 were sent to the President's desk by the Congress, is it your expectation that DOT would recommend a veto?

Mr. WILLIS. I would say that it is a personal view at this stage, but that would be my expectation of the way we would come down, yes.

Mr. MINETA. On a different issue, several months ago, we asked DOT for its proposals to insure that after sunset, international route decisions would be insulated from political pressures. To date, we have received no answer. Although we are delaying hearings on this issue until the fall, we would still like an answer to our letter.

Could you tell us when that might be forthcoming?

Mr. WILLIS. I can report back your request to Secretary Dole. We are thinking along the lines of what you suggest for the timetable.

We are engaged in discussions this week with the Civil Aeronautics Board and can produce for you a response promptly.

Mr. MINETA. Very well. Mr. Secretary, thank you very much for your testimony, and I appreciate your being here.

Let me just announce that because of a full committee meeting on Thursday at 10 a.m., the subcommittee will resume these hearings at 1 p.m. on Thursday in this room.

The subcommittee stands adjourned.

[Whereupon, at 4:45 p.m., the subcommittee was adjourned until 1 p.m., Thursday, July 28, 1983.]

REVIEW OF AIRLINE DEREGULATION AND SUNSET OF THE CIVIL AERONAUTICS BOARD

(Government Regulation of Relationships Between Airlines and Travel Agents)

THURSDAY, JULY 28, 1983

House of Representatives,
Subcommittee on Aviation,
Committee on Public Works and Transportation,
Washington, D.C.

The subcommittee met, pursuant to notice, at 1:12 p.m., in room 2167, Rayburn House Office Building, Hon. Norman Y. Mineta (chairman of the subcommittee) presiding.

Mr. Mineta. The Subcommittee on Aviation will please come to order.

This is the continuation of the subcommittee's hearings on Government regulation of the relationships between airlines and travel agents, and we're pleased today to have Hon. William F. Baxter, Assistant Attorney General of the Antitrust Division of the Department of Justice, with us.

Mr. Baxter, we have your prepared statement and it will be made a part of the record at this point.

[Statement referred to follows:]

Statement of William F. Baxter, Assistant Attorney General, Antitrust Division

Mr. Chairman and members of the Subcommittee, I very much appreciate the opportunity to be here to discuss H.R. 2053, a bill entitled the "Air Travlers Security Act of 1983." The bill would continue unnecessary impediments to competition in the sale of airline tickets and thus raises important issues about whether the Congressional decision to deregulate the airline industry will effectively be implemented and about the future of competition in the marketing of airline passenger service.

The bill would simply direct the Civil Aeronautics Board (CAB) to vacate its decision in the Competitive Marketing Investigation [1] and would require the CAB to adopt the decision of the administrative law judge—a decision that the CAB had rejected in two key respects. First, the CAB declined to continue approval for the "exclusivity" provision of the airlines' agreement, which was the focus of the investigation; second, it declined to continue antitrust immunity for the remaining provisions of the agreements it approved. The bill's effect essentially would be to reinstate the past scheme whereby airlines were permitted under a grant of antitrust immunity to agree among themselves to limit ticket sales to a set of collectively approved travel agents. By contrast, the CAB's decision, if allowed to stand, would remove the antitrust immunity previously afforded these agreements, but, of course, would permit each airline to deal (or not to deal) with any ticket seller it unilaterally chooses, including travel agents and other outlets. The Board's decision would also permit an airline to impose conditions on its agents, subject only to relatively narrow constraints imposed by the antitrust laws governing vertical relationships, that is, relationships between a supplier of goods or services and distribution of those same goods or services. Because reinstatement of antitrust immunity would be highly anticompetitive and a serious step backward in the process of eliminating unnecessary government regulation of the airline industry, the Department of Justice strongly opposes enactment of the bill.

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[1] CAB Order 82-12-85, Docket 36595, Dec. 29, 1982.

Before commenting more specifically on the bill's effects, I would like to place it in perspective by recounting briefly the history of the agreements affecting travel agents that it would preserve, including the exclusivity agreement.

Since the very early days of significant air passenger transportation, airlines' ticket sales through travel agents have been regulated by the airlines acting collectively under a grant of antitrust immunity from the CAB. Under the so-called "exclusivity agreement," the airlines, through the Air Traffic Conference—ATC—and the International Air Transport Association—IATA, jointly decided that they would market their services only through their own ticket offices and through collectively chosen conference travel agents.[2] Under the agreement the airlines also collectively decided the level of commissions they would pay their accredited travel agents.

In looking at the relationship between airlines and travel agents during the many years of airline regulation, one observes that it worked out to a fairly simple *quid pro quo*. The airlines had immunity from the antitrust laws that enabled them collectively to fix travel agent commissions at relatively low levels. Because airlines were protected from having to compete among themselves by paying higher commissions to travel agents in order to induce sales of their services, they were able to keep their marketing costs relatively low. In addition, because of the exclusivity agreement, an airline did not have to fear that a competitor would start selling tickets in a new way that would threaten its market share—the exclusivity agreement ensured that all airlines would sell their services only through conference-approved travel agents and not through new or innovative outlets. Thus, in exchange for the limitation on their commissions, travel agents as a group were protected from competition from others, such as Ticketron and corporate travel departments, who desired to distribute airline tickets in a manner different from that of traditional travel agents. Moreover, travel agents were also partly protected from competition among themselves by ATC and IATA rules that strictly prescribed the way in which travel agents were required to operate. Under regulation, all the foregoing arrangements had to be approved by the CAB and, once approved, were accorded immunity from the antitrust laws.[3]

Finally, under regulation, all persons selling airline tickets were required to charge the price specified in the tariffs filed with the CAB. Thus, travel agents were required to charge the same prices that airlines charged and so could not engage directly in price competition among themselves, that is, by acccepting a lower commission on a particular sale.

When Congress passed the Airline Deregulation Act of 1978,[4] it sought to replace the existing regulatory scheme with reliance on competitive market forces wherever possible and to grant antitrust immunity only where important transportation needs could not be fulfilled by less anticompetitive means. As a result of the Act and earlier efforts by the Board, economic regulation of air transportation began to yield to the competitive discipline of the marketplace.

For the relationship between airlines and travel agents, actual deregulation came in a series of steps. First, the agreements among airlines fixing travel agent commissions were terminated, opening competition among airlines for travel agent business.[5] As one would have expected, commissions increased, going from their non-competitively fixed level of seven percent to a competitively determined level of ten percent. While travel agents were still protected—by the exclusivity agreement—from competition initiated by airlines seeking distribution methods of comparable value at lower cost, airlines were no longer protected from competition among themselves for travel agent business.

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[2] The airlines' exclusivity agreement has been modified slightly, but this remains its essence. Under H.R. 2053, conference travel agents would be the exclusive means by which airlines could sell their tickets through an agency relationship. Because of the broad and vague definition of an agency relationship, this is virtually the same as a flat prohibition on any sales other than through a conference travel agent. In fact, the administrative law judge was so uncertain of the agency definition that he made a special exception for Ticketron, to be sure that it (though not necessarily others) could enter.

[3] 72 Stat. 770.

[4] Public Law 95-504, 92 Stat. 1705.

[5] CAB Order 80-2-33, Feb. 5, 1980 (domestic); CAB Order 78-8-87, Aug. 17, 1978 (international) (international commissions had in practice been open for several years previously because of competition among carriers).

Indeed, because the travel agent entry restrictions were left intact, opening commissions to competition may have had undesirable side effects. It put upward pressure on travel agent commissions, without giving airlines the option of using lower cost alternatives to keep travel agent costs in check. Hence, airlines are probably spending more for travel agent services than they would otherwise spend if they were free to use retailers outside the conference program. These extra costs, of course, are passed on to consumers.

Despite higher commissions, airlines have not abandoned the exclusivity agreement. This inaction is likely the result of two factors: first, the airlines may fear that travel agents would retaliate against any airline that initiated such a change by recommending other airlines to their customers; and second, airlines may desire not to open new avenues of marketing competition among themselves.

The continued antitrust immunity of the exclusivity agreement and thus the continued protection of both travel agents and airlines from new and innovative competition was the central dispute in the Board's Competitive Marketing Investigation. The administrative law judge would have essentially continued the status quo in the face of clear evidence that competition among both airlines and agents was needlessly restricted and despite the fact that Congress had directed maximum reliance on competition in enacting the Airline Deregulation Act. He found that the market could not be relied upon to ensure that consumers' travel service needs were met in a cost efficient way, and he granted approval to, and antitrust immunity for, most of the agreement, including exclusivity with a minor modification, and created a special exception for entry by Ticketron, but not for others.

However, upon its review, the Board decided to disapprove the exclusivity agreement, finding that the public interest would best be served by opening entry into the airline ticket distribution industry. The Board also upheld the many procompetitive features of the airlines' agreement, such as the Area Settlement Plan and joint accreditation on factors without anticompetitive significance, as we had urged them to do. In reaching its decision, the Board emphasized the Congressional mandate to place primary reliance on the competitive market forces embodied in the antitrust laws:

> With the Airline Deregulation Act (ADA), Congress rewrote the operating assumptions in the airline industry. Government oversight of fares and services was replaced with reliance upon market forces to determine which carriers provided services and at what prices. Of course, the new reliance on competition has not been limited to entry and fares, but is to be the basis for all our decisions. That must be the starting point in this case. Absent a demonstration that the public would be better served by solutions that cannot be attained in a competitive environment, the air transportation marketing industry must be opened to the normal operations of market forces.
>
> As a result, we approach arguments that competition is necessarily destructive and that government intervention is preferable to the free marketplace with a large measure of skepticism. Unsubstantiated fears that competition will produce less desirable results than those produced under regulation are simply not sufficient reason to protect the present system from competition.[6]

By contrast, H.R. 2053 if enacted would continue, with minor changes, the existing scheme of regulation. Thus, it would permit continuation of the horizontal exclusivity agreement among airlines, despite the fact that it is anticompetitive in purpose and effect and thus injurious to consumers and to society as a whole.

Because the Board's decision places reliance on the antitrust laws rather than on continued regulation, it is important to be clear about what those laws prohibit and what they allow. As a general proposition, many agreements among competitors are unlawful because they significantly restrict competition and have the effect of reducing the output of goods and services below the level that would exist in a freely competitive market, without countervailing procompetitive benefits. For example, the exclusivity agreement that was the subject of the Competitive Marketing proceeding is an agreement among competing airlines by which they agree not to compete with one another through new, innovative, or more efficient means of retailing air transportation that do not fit existing conference travel agent standards. Thus, because that agreement constituted a seroius restriction on competition and produced no public benefit, in the absence of immunity it would be found to be an unreasonable restraint of trade under the antitrust laws.

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[6] CAB Order 82-12-85, Docket 36595, at 3-4, Dec. 29, 1982.

Not all horizontal agreements among competitors are illegal, however. For example, the essential features of the joint airline accreditation program for travel agents, if nonexclusive, reasonably related to a legitimate purpose, and nondiscriminatory, would constitute an efficient and procompetitive joint activity. The antitrust laws would not prohibit such a program, as we have noted before the Board.[7] They would permit the airlines collectively to operate, and to share the costs of evaluating travel agent applications under, such a joint accreditation program.

Likewise, the airlines could continue their existing Area Settlement Plan, which is a clearinghouse for money owed by travel agents to airlines for tickets they have sold. This plan also is an efficient joint venture of the airlines, not unlike bank clearinghouses, which find no difficulty operating without antitrust immunity. Because the Area Settlement Plan does not reduce competition, it would not be prohibited by the antitrust laws.[8]

I might also note that, contrary to the assertions of some critics of the CAB's decision, interlining will not be ended or impeded by application of the antitrust laws to the airline industry pursuant to the Board's decision. Interlining, which is the practice of airlines exchanging passengers on connecting flights while using only one ticket, does not violate the antitrust laws because it does not reduce competition between the interlining carriers.

Finally, application of the antitrust laws will not seriously impede the development of procompetitive vertical relationships between an individual carrier and its ticket agents. For example, under the antitrust laws, an airline, acting individually, is free to decide that travel agents will be the exclusive means by which it will market its tickets. No airline will be forced to sell its tickets through a Ticketron or any other outlet it does not choose to use. In addition, an airline is free to enter nonprice agreements with its retailers;[9] in other words, an airline, acting individually, may require retailers it has appointed to agree to maintain certain standards or to perform certain functions.

In sum, I can assure you that the antitrust laws accommodate a wide array of both horizontal and vertical arrangements in this industry that may be necessary to provide adequate information, maximize consumer acceptance, and reduce the costs of distribution.

Antitrust immunity should not be granted lightly. By preventing cartel-type agreements, the antitrust laws are designed to protect the competitive functioning of markets and thus to ensure that society's limited resources are allocated efficiently. When considering a proposal for antitrust immunity, we must be certain that there is a good reason to depart from those general principles by which our free market economy is ordinarily governed. Only if there is a market failure that could be corrected by some type of conduct, and that conduct would otherwise be prohibited by the antitrust laws, should antitrust immunity be considered. Even then, it should be granted only when there is strong reason to believe that the immunity's expected benefits exceed its expected costs.

One issue that is sometimes raised is whether there is a substantial "free rider" problem in this industry that might lead to a market failure unless the airlines are permitted agreements that the antitrust laws would normally prohibit. Some proponents of the bill have raised this issue, at least indirectly, by predicting the decline of the existing "broad retail network" of travel agents if this bill is not enacted. In general, a free rider problem may arise in a setting in which a service, such as the provision of specialized information, is important to the sale of a product and where it is difficult or impractical to charge separately for the service. Some suppliers may determine that their product is most competitive when this service is offered without charge to the consumer, with the cost being calculated into the retail price of the product. In order to induce their dealers to offer such a service, suppliers must either compensate their retailers directly or in some way enable the retailers to earn the higher gross margins necessary to support the overhead attributable to the provision of these services. Otherwise, retailers offering "free" ancillary services will be undercut by other retailers who offer no such services. The prospect of "free-riding" by discounters on the informational services of other retailers diminishes the incentive of retailers to offer these services in amounts necessary to insure an efficient distribution system. As a result of this "free-riding", fewer of the supplier's products find their way into the market, to the detriment of consumers as a whole.

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[7] Department of Justice Brief to the Board, Competitive Marketing Investigation, Docket 36595, July 28, 1982, at 67.

[8] As we noted before the Board, there would be an antitrust problem if airlines acting in concert unreasonably denied access to, or required the use of, the Area Settlement Plan. Brief to the Board at 69–73, July 28, 1982. The airlines indicated to the Board that they do not follow either practice, so the Board did not require any changes in the plan.

[9] *Continental TV, Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

In the airline industry, a free rider problem might arise where a customer could obtain from a travel agent all the information he needed about such matters as flight times, stop-overs, and interconnections and then purchase his ticket from a no-service discount sales outlet. If such a phenomenon were widespread, it could drive out the information-providing outlets, because they could not cover their costs, with the result that the information would not be available even to consumers who would be willing to pay for it.

While the impact of the free rider problem in the airline marketing industry is an empirical question the answer to which is difficult to predict, there are some indications that the free rider phenomenon here may not end the provision of information and other services to travelers who desire them.

First, over half of all travel agent sales are to regular business customers, for whom agents usually provide record-keeping and other services under a contractual relationship. Second, travel agents provide many services, in addition to ticket sales, that customers may not be able to obtain from a simple ticket sales outlet (*e.g.*, hotel reservations, car rentals, boarding passes, seat selection, frequent flyer programs). Third, travel agents can do some screening of customers who appear only to be seeking information—indeed, they do it now. Fourth, travel agents may be able to charge for certain extensive information-providing and counseling services, as for example, in connection with vacation planning. (Until recently, CAB regulation prohibited such charges.) These and other factors may suggest why in the stock brokerage industry, for example, a somewhat comparable industry in which information is important, discount and full service retailers coexist.

If an individual airline believes, however, that greater dissemination of services and information to the public is important to maximize demand for its product, the antitrust laws permit steps to be taken to correct whatever free rider problem may exist. The Supreme Court has recognized that, in some circumstances, non-price vertical restrictions that constrain the form of intrabrand competition among retailers are a legitimate and socially desirable way to cure the "free-rider" problem and promote interbrand competition. For example, as I noted above, in a deregulated environment an airline may confine ticket sales to distributors who provide specific information services.[10] Thus, even if the potential for a significant free rider problem to develop is present, the airlines each acting in its own individual interest, can take remedial steps to prevent it from becoming serious without fear of liability under the antitrust laws.

The horizontal agreement among airlines that would be preserved by H.R. 2053 could accomplish no more to solve any free rider problems than what the airlines could achieve acting unilaterally in their own competitive self-interest. Nor is the bill needed to authorize the procompetitive joint airline activities that the antitrust laws permit. At the same time, the bill raises the specter of an unnecessary, anti-consumer reduction in competition among the airlines in the marketing of airline tickets. Because of the unreasonable anticompetitive nature of the exclusivity agreement, enactment of H.R. 2053 is likely to result in unnecessarily high ticket prices and less air passenger service than in a fully competitive market. Airlines would be permitted to agree not to use innovative or low-cost means of providing ticketing services to customers, and travel agents would be protected from the competition of alternative, less costly means of distributing airline tickets.

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[10] In some circumstances, resale price maintenance may also be used to correct a free rider problem. By eliminating intrabrand price competition, the supplier may enable its retailers to provide costly promotional or informational services and thereby increase the attractiveness of its product. Indeed, it is the indirect lessening of intrabrand price competition by nonprice vertical restrictions that eliminates the free-rider problem and gives such restrictions their procompetitive potential. Price-related vertical restrictions in general, and resale price maintenance in particular, accomplish directly what nonprice vertical restraints accomplish indirectly; both types of practice are designed to increase both price and sales volume. Although under current law resale price maintenance is per se unlawful, the Supreme Court next term in the *Monsanto* case will have an opportunity to reconsider this rule. Because of the procompetitive potential of resale price maintenance, the Department in its amicus brief has asked the Court to eliminate the unwarranted distinction between price-related and non-price vertical restrictions and to analyze each vertical restriction individually in the circumstances in which it occurs to determine whether it is anticompetitive.

H.R. 2053 would not, of course, affect the question of whether airlines are permitted to engage in resale price maintenance. As suggested in the text, there is no reason to doubt that airlines will be able, through non-price vertical agreements, to assure a desirable flow of information to consumers if H.R. 2053 is not enacted.

Congress should not adopt this outcome, which is a vestige of airline regulation. Rather, the airline ticket distribution industry should be made subject to the full application of the antitrust laws that apply to our other industries, as the CAB's Competitive Marketing decision would do. This result is in the public interest because it will permit the free, competitive functioning of this market. As I stressed in my testimony, the antitrust laws, properly understood, generally prohibit only those activities that unreasonally restrain competition among competitors, and they do not prohibit a wide array of horizontal and vertical arrangements that promote efficiencies and are procompetitive.

Accordingly, the Department of Justice strongly opposes H.R. 2053 and recommends that it not be enacted.

Mr. MINETA. Please proceed.

TESTIMONY OF WILLIAM F. BAXTER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. BAXTER. Thank you very much, Mr. Chairman. Since you have made my full statement a part of the record, it does not seem to me that there is a great deal to be gained by an extensive recitation of that statement, and I will try to summarize it quickly and make myself available to the committee for such questions as they may have.

The Department of Justice is strongly opposed to the enactment of H.R. 2053. In requiring the CAB to reinstate the decision of the hearing examiner, that legislation would continue the imposition of a series of totally unnecessary restrictions on competition in the process of the distribution of airline tickets.

We see no reason for preserving that particular fragment of airline deregulation. It is as anticompetitive as the worst features of the scheme which Congress so wisely eliminated several years ago.

The CAB for the most part adopted the hearing examiner's opinion. It rejected and wisely rejected, in our view, two key features: The feature of exclusivity, which I will describe briefly, and the continuation of formal antitrust immunity.

We certainly concur with the action of the Board in those respects.

As the committee undoubtedly knows, the history of this industry has been one of regulation, regulation from the design of the aircraft itself to the final ticket sales process. The airline industry, historically, has made a collective determination of exactly who they would permit to sell their tickets, the necessary characteristics of those agents. It has determined the final selling price of tickets to the final customer, and allowed the agents a commission, which might also be referred to as a retail margin, or retail markup, thus, determining the magnitude of the retail markup, and it has made that decision collectively, essentially as a monopsonistic buyer of retail distribution services.

Entry into the business of distributing airline tickets was effectively blocked except to the extent that enterprises conform to this collectively determined set of requirements.

As I say, we view the deregulation of this industry as a sound choice made by Congress several years ago. One of the consequences of deregulation was that the collective determination of commissions was ended, and, indeed, as one might have expected, the magnitude of the commission now determined in a semicompetitive market has increased from 7 percent uniformly to 10 percent, more or less, with some variation as, indeed, one would expect.

On the other hand, the agents themselves are not subject to price competition among themselves, and undoubtedly it is true that to some unknown and, indeed, unknowable degree, competition would impose pressures on that margin, and it might fall somewhat below 10 percent, or, indeed, several different types of ticket resellers might come into existence, a possibility that is now precluded by the collective determination of the agency system with different commissions prevailing for different kinds of services.

The one thing that I think that can be said for certain is that the continuation of the course of deregulation here, and the introduction of competition into this phase of the airline industry would, in general, be good for consumers, good for airline passengers. It would permit this particular phase of economic activity, like so many other phases of economic activity, which are indistinguishable from it in their commercial and industrial features, to be a part of a competitive marketplace. And that, in our view, is where it belongs.

A number of assertions have been made about the extent to which one would have to anticipate antitrust difficulties with features of the airline ticket distribution process if the Civil Aeronautic Board's immunity were removed.

Those assertions are erroneous, almost without exception. There is no reason to expect that the antitrust law would interfere with any significant aspect of the distribution process, or, indeed, with those features of the agency system that would continue if the exclusivity feature of the antitrust immunity was removed.

I view the primary characteristics of the arrangements that would remain as involving, first, joint accreditation. There is no reason why a process of joint accreditation could not continue. It would, of course, continue only for those who chose to be a participant in the process, rather than having all coerced to remain participants involuntarily in the process.

The clearinghouse feature of the existing agency arrangement is an important one. It seems to us to be a very efficient and desirable system. There is no reason whatsoever to suppose it would give rise to antitrust problems in the absence of immunity. Again, of course, it would become voluntarily. Sellers of tickets would not be required to use it, but there is no reason on Earth to think that any outcome is to be expected other than an outcome under which most did in fact use it because it appears to be, by a wide measure, the least expensive way of achieving those inescapable functions of remission and distribution of funds among the participants.

And finally, I would like to state very categorically that there is no antitrust problem involved with the process of interlining, of setting a single transportation fee for a ticket that consists of several parts; involving one carrier, let us say, carrying a passenger from Washington, D.C., to Chicago, and another carrier transporting him to Seattle under the coverage of a single ticket.

Interlining is common in all transportation industries. It obviously is an essential feature of those industries, and there is nothing in the antitrust laws that wouldn't permit it.

In short, we would strongly urge the committee to reject this proposed piece of legislation, Mr. Chairman. We think it's unnecessary. We think it inappropriately preserves an anticompetitive regime in an area where there is no reason whatsoever to forego the considerable advantages of competition, and we do not believe there is any serious antitrust problem that will arise to trouble those features of the existing system which the Board chose to continue.

Let me stop at that point, Mr. Chairman, and see if there are questions which you or members of your committee have.

Mr. **MINETA**. Very well, Mr. Baxter. Let me thank you for your very fine and complete statement relative to H.R. 2053.

Do I understand correctly that it's your position that the antitrust laws do not prohibit an industry from adopting standards of accreditation to insure that agents used by the industry are honest, competent, and financially reliable, so long as members of the industry are also free to use nonaccredited agents?

Mr. **BAXTER**. That's a very good statement of our position, Mr. Chairman.

Mr. **MINETA**. Am I also correct in understanding that it is your position that the area settlement plan currently used by the airlines and their agents is not prohibited by the antitrust laws?

Mr. **BAXTER**. Yes, Mr. Chairman. That also is correct. The area settlement plan is what I referred to in my short statement a moment ago as the clearinghouse arrangement, and, as I say, we regard that as a very desirable, sensible, and procompetitive arrangement.

Mr. **MINETA**. Now, has the Department evaluated the accreditation standards which the airlines now use to insure that agents are honest, competent and financially responsible?

Mr. **BAXTER**. Yes, we have, Mr. Chairman, and in substantially all respects we were completely untroubled by it. We did think there was one requirement that went too far, and arbitrarily excluded a class of participants, and that was in the treatment of the question of competence. There was a requirement that one demonstrate competence by having had a year's experience, in the case of an employee, or I think 2 years' experience in the case of a manager of a local office with some other travel agent.

But the rules went on to provide that management of a corporate travel office would not suffice in that respect. The kind of experience one gets in a corporate travel office, the kind of information one gathers was, in our view, substantially similar to that which was gathered in a public travel office, and that particular requirement seemed to us unjustified. That, of course, is a matter, perhaps, of reasonable dispute.

But the basic notion that a group of companies can get together and say let's set reasonable criteria for the people who are going to be distributing our product. That gives rise to no general problem at all, unless it is tailored in a way to exclude a class of competitors, and with the possible exception of this corporate office problem, we saw no such features in the accreditation process now in place.

Mr. **Mineta**. With those exceptions, then, you would say that these standards seem generally acceptable under the antitrust laws?

Mr. **Baxter**. Yes, I would, Mr. Chairman.

Mr. **Mineta**. Are there other industries which have been able to adopt industrywide standards to insure honesty and competency without running afoul of the antitrust laws?

Mr. **Baxter**. That occurs in a wide number of industries, Mr. Chairman. In some cases, of course, it applies by State licencing procedures. But in other places, it occurs in a voluntary way.

The securities industry is one example where brokers and customermen are required to have certain kinds of substantive knowledge. I think the case of CPA's, where there are industrywide examinations for competence. It is not uncommon, and with the kind of exception I alluded to a moment ago, it raises no antitrust problems.

Mr. **Mineta**. Mr. Baxter, I would like to pose a hypothetical question to you based on a scenario of events predicted by the travel agents association.

They predict that if the Board's decision is allowed to take effect, corporate travel departments will be able to force changes in the accreditation standards so that corporate travel departments will be eligible for accreditation.

Suppose this occurs, and each airline then decides unilaterally that it will not pay commissions to accredited corporate travel departments. Would this action by individual airlines raise antitrust problems?

Mr. **Baxter**. An individual seller of goods or services, such as an airline selling its transportation services, is completely free under the antitrust laws to decide with whom it will deal and the terms on which it will deal, with only rare exceptions not immediately relevant here.

If the decision were made by the individual airline, not to deal with corporate travel services, that would raise no antitrust problems.

Mr. **Mineta**. Now, one of the problems that the opponents of the CAB's decision have raised is that even if the Department of Justice concludes that there are no antitrust problems with an agreement on accreditation and the area settlement plan, this does not prevent private parties from bringing a lawsuit.

I recognize that a Department of Justice opinion or a CAB decision approving the agreements without antitrust immunity would not be binding on a court in an antitrust case brought by private parties.

But do you think that as a practical matter the Department of Justice's opinion and the CAB opinion could be brought to a court's attention, and that it would be given some weight by that court?

Mr. **Baxter**. I think it is quite right to say that neither in any official or legal sense is binding on a court in a private antitrust action.

It may be the case that there is a sense in which the CAB's determination is partially binding, insofar as the proceeding before the CAB was a litigated matter in which there were parties, in which there were specific legal issues disputed, litigated, and resolved.

I think one could persuasively argue, although I don't think the point is entirely clear as a matter of law, that the CAB proceedings collaterally estopped the inconsistent assertion of facts that were determined in the CAB proceeding. I'm not sure how many members of the committee are lawyers, but there is a legal doctrine known as collateral estoppel that keeps parties who have participated in an adjudication from subsequently asserting factual positions that are inconsistent with the determination of that tribunal; so that insofar as the private, antitrust plaintiff were an entity that participated as a party before the CAB proceeding, they might be collaterally estopped by the determination of the CAB as to any given factual matter in a subsequent antitrust action brought by them.

Nevertheless, that would not be a sufficient answer as to parties, as to individuals, plaintiffs, who were not parties to the CAB proceeding. There it is quite clear, I think, that neither the CAB's action or any opinion we might express would formally be binding on the court.

On the other hand, I also think it is quite clear that the action of the CAB or positions that the Antitrust Division had taken could be brought to the attention of the court, and I would expect that they would be of nontrivial influence in that regard, although not binding.

Mr. **Mineta**. Previously, you testified that there are industries which have agreements comparable to the travel agent agreement which set standards of honesty, competence and financial responsibility.

Apparently these agreements have been able to continue despite the possible problem of frivolous antitrust lawsuits. Do you see any reason the problems of frivolous lawsuits could not also be overcome in the airline industry?

Mr. **Baxter**. I don't see any important differences between this industry and a variety of other industries that would lead to a more substantial problem of trivial lawsuits for this industry.

I think it is true that the phenomenon of awarding treble damages in the antitrust area generally creates incentives to engage in frivolous litigation—strike litigation—with respect to all of our industries.

That is a general problem in our economy, that Congress may at some point wish to address. But I see no peculiar sensitivity of this industry to that problem, and I would think it very inappropriate to respond to that problem for this industry with an industry-specific solution when the problem is, in fact, common to the entire economic system of our Nation.

Mr. **Mineta**. Your testimony states that the Department of Justice, "strongly opposes H.R. 2053." Do you anticipate that the Department would recommend a veto if this legislation was enacted?

Mr. **Baxter**. Mr. Chairman, I want to make clear that I am speaking for the Department of Justice, that, so far as I am aware, there is no administration position on this; still less, I suspect, has any thought been given, whatsoever, to whether the President would in fact veto it.

But I can tell you that we would recommend a veto.

Mr. MINETA. Previously we had the Deputy Assistant Secretary Frank Willis of the Department of Transportation, indicating that they would recommend a veto as well as Mr. Christopher Demuth from OMB.

Mr. Hammerschmidt.

Mr. HAMMERSCHMIDT. Thank you, Mr. Chairman, and thank you, Mr. Baxter, for your statement.

Mr. Baxter, the proponents of H.R. 2053 believe that without antitrust immunity, the current distribution network would likely be destroyed.

Therefore, they present us with a choice of either overruling CAB or watching the present system self-destruct.

In contrast, the Justice Department believes that the current air traffic conference system could exist without antitrust immunity if certain modifications were made to the agreements as they exist today, as I understood your statement. And you touched on a couple of those items, but I wonder if you would tell us or provide for the record a list of those portions of the ATC agreements which the Department feels could not exist without immunity.

And I know you touched on corporate travel department exclusions, and the requirement that managers have 2 years experience. Are there any others that we should consider?

Mr. BAXTER. You understand, Mr. Hammerschmidt, that those are merely two among a set of competency qualification requirements, and it isn't even clear to me that standing alone they would justify the conclusion that the agreement violated the antitrust laws, although we do think that particular feature is anticompetitive and ought to be changed.

That is the only feature that I am aware of as of this moment. I mean I don't—I have not, myself, combed the agreement with an eye to picking out every possible objectionable feature, but I have no hesitancy in saying that in its basic scope and structure, the agreement is not troublesome, would not raise antitrust problems.

Whether on a careful examination I could find one or two more minor aspects that I would rather not see there. I guess I would prefer not to commit myself on that. But I have no difficulty saying that the general nature of the agreement is not troublesome from an antitrust standpoint.

Mr. HAMMERSCHMIDT. Fine.

Mr. BAXTER. Thank you, Mr. Hammerschmidt.

Mr. HAMMERSCHMIDT. In its testimony, ASTA mentions the issue of U.S. export trade and claims that the Federal antitrust laws had a "chilling effect" on cooperative exporting efforts because of the continuous exposure to antitrust challenges.

It cites the Congress passage of the Export Trading Company Act of 1982 which clarified the existing antitrust immunity and eliminated much of the uncertainty and confusion in this area.

Do you believe this example is analogous to the existing travel agency distribution system, and demonstrates that antitrust immunity should be preserved?

Mr. BAXTER. No, I certainly don't think it's at all analogous. Indeed, it was my view that the depressing effect which the asserted uncertainty about antitrust had on export activity was vastly overstated.

It actually had no such depressing effect at all, or only very minor effect. There was, however, a wide perception that there were uncertainties there, and I saw no reason why Congress should not go ahead in the Export Trading Company Act to which you refer and clarify the antitrust laws in those respects.

And the Congress did that, and so far as we know, that worked quite satisfactorily.

But the problem is totally different. There is no similarity whatsoever, and I am unable even to guess what similarity they have in mind when they invoke that as an analogy.

Mr. **Hammerschmidt**. Apparently one of the provisions of the Export Trading Act was to narrowly limit the antitrust exposure of these activities by barring any criminal prosecution and restricting private antitrust action to actual, instead of the usual treble damages.

Evidently you don't think there is enough similarity to where that would apply to what we're considering here before this committee at all?

Mr. **Baxter**. Well, I don't think there's much similarity, but of course insofar as the Export Trading Company Act limited damages to single damages, and thus addressed the treble damage problem in that context, why I would refer back to the statements I made a few moments ago about the overstimulation of antitrust litigation to which the treble damage remedy gives rise, and the problems that poses for all industries.

But again, I would say there is nothing unique about this industry in that respect.

Mr. **Hammerschmidt**. Mr. Baxter, both ASTA and ATA argue that without antitrust immunity it is very unlikely that the Office of the Travel Agent Commissioner would be able to exist. This is the office which you know has been created to act as an arbiter in disputes involving new agent applications and enforcement of existing air traffic conference provisions.

Do you agree with this assessment?

Mr. **Baxter** No, I don't agree with it, Mr. Hammerschmidt. Dispute resolution mechanisms of that sort are not proscribed. One can eliminate the possibility that they might be abused in particular instances, or used in an anticompetitive way in particular instances.

But any notion that the office and its central functions would themselves give rise to an antitrust problem I think is incorrect.

When one encounters a series of assertions that have as little foundation as these assertions have, one might wonder whether the parties that are advancing them are not seeking the very anticompetitive shelter that I have described the present system as generating, because the propositions certainly are not at all persuasive as far as I can see.

Mr. **Hammerschmidt**. Mr Baxter, in his testimony on Tuesday, FTC Chairman Miller spoke of a newly developing doctrine whereby the courts are attempting to discourage sham litigation for anticompetitive ends.

You touched on this to some degree in the response to the Chairman. I wonder if you could elaborate on what this evolving judicial doctrine is and the extent to which the existing system is successful in discouraging frivolous antitrust litigation.

Mr. **Baxter**. I don't believe, Mr. Hammerschmidt, that I did touch on it. I referred to, again, the overstimulation of frivolous cases by the treble damage standard.

Mr. **Hammerschmidt**. I stand corrected on that.

Mr. **Baxter**. I can only guess what Chairman Miller was describing, but I think I know what he was describing. I think he was describing a series of cases that have come in the wake of a Supreme Court decision called *California Motor Transport* case. And I don't want to tell you more about this doctrine than you want to know.

But I think I have to start off by saying there is one set of circumstances under which a group of companies, usually companies in a single industry, can get together and collectively seek blatantly anticompetitive results. And that is in their right to petition government in some way.

An industry can come to Congress and say the sky will fall unless you prohibit all competition in our industry, and they have not violated the antitrust laws, even if you can go into court and prove as a matter of fact that they knew perfectly well that the sky was not going to fall, indeed, no part of it was going to fall.

That is generally referred to as the Noerr doctrine. It is a first amendment-oriented concept that arose out of some lobbying efforts by the railroads some years ago. After that case was decided, there was a case that arose out of practices that occurred before the State Motor Carrier Authority in California, whereby the existing carriers agreed among themselves that they would oppose each and every application for new operational authority that was made to the Commission whether there was any basis for thinking that they could actually prevail on the merits or not.

And they attempted to invoke the Noerr doctrine to defend their activities, and on this occasion, the Supreme Court said in the *California Motor Transport* case, as I said a moment ago, no, that this is a sham use of the governmental processes that was not protected by Noerr.

But I think it would be a mistake to see that as a doctrine. It really, it simply is a nullification of the Noerr defense in a recognition of the fact that to harass one's competitor and attempt to interfere with his competitive activities by multiple and groundless lawsuits can itself be an agreement in restraint of trade within section 1 of the Sherman Act.

Now, I guess that that's what Mr. Miller was talking about. I couldn't say that I'm certain.

Mr. **Hammerschmidt**. Thank you for your responses. Thank you very much for being here today, Mr. Baxter.

Mr. **Mineta**. Ms. Ferraro.

Ms. **Ferraro**. Thank you, Mr. Chairman.

Mr. Baxter, I am not a cosponsor of this piece of legislation and I'm not because I'm really having trouble deciding for myself—and that's why I really wanted to participate in these hearings—on the value of the legislation.

You point out in your testimony on page 7 that it would permit continuation of the horizontal exclusivity agreement among the airlines, despite the fact it is anticompetitive in purpose and effect, and thus, injurious to consumers and to society as a whole.

And another place you point out that the public interest would best be served by opening entry into the airline ticket distribution industry.

I guess because I'm looking at it from a consumer's point of view that I have this ambivalent feeling about the legislation.

Congressman Florio was before our committee the other day and he made a very, very good presentation. And in his testimony he said, "without a common ticket stock as the current system uses, the seller of airline tickets is necessarily limited in what it can offer the airline traveler. Such restrictions can only limit the choice available to the consumer and the ability of providers of airline tickets to serve the traveling public."

He seems to come from a different view as to whether or not it's in the consumer's and the public's interest to keep things in place as they are.

Could you comment further on both his and your position?

Mr. **Baxter**. Well, needless to say I didn't hear the Congressman's full statement.

Ms. **Ferraro**. That's why I wanted to share it with you.

Mr. **Baxter**. So I will respond only to the portion of it that you read to me. But that portion, obviously, contemplates that there would be some difficulty about using a common ticket stock if the antitrust immunity of the preexisting CAB order were not continued.

And that simply is not correct any more than the fact that General Electric and Sylvania and Westinghouse have gotten together and agreed on a common size lamp base for light bulbs. There is nothing that keeps companies in an industry from getting together and agreeing to standardize particular features of their product that are necessary to facilitate interchangeability. And I would regard a common ticket stock as exactly of that kind.

There is no reason whatsoever that the airlines could not go on using a common ticket stock if they wish to do so. And insofar as his statement presupposes that that's not the case, it simply is erroneous.

Ms. **Ferraro**. Well, what about the fact that the Federal Aviation Act allows for exemption from the antitrust laws if an agreement could produce significant public benefits which cannot be achieved by reasonably available alternatives which are less competitive.

Now, taking a look at the situation as it exists now, it is your position that CAB should not grant antitrust immunity, and in taking that position, did you consider the benefits of the ATC system, when you took that position?

Mr. **Baxter**. Surely.

Ms. **Ferraro**. Do you think those benefits can be retained without immunity and that perhaps follows up a little more what Mr. Hammerschmidt was saying.

Mr. **Baxter**. Yes, I certainly do. And, of course, the act, itself, has been repealed subject to a sunset provision, so that the particular agreement authority to which you refer has already been prospectively legislated out of existence by the Congress, although that will devolve upon some other agency, either the Department of Transportation or the Department of Justice, under the existing statutory framework.

But the point is rather a different one as far as I am concerned, and that is, whether it be a common ticket stock, or this clearinghouse arrangement that has been set up, or the joint qualification approach, it simply isn't the case that all agreements among competitors are somehow invalid. The question is whether they facilitate competition and thus are in the interests of consumers, or whether they interfere with it in some way.

And, of course, we can consider the beneficial aspects, and regularly do so. And a common ticket stock is a very good example of how it facilitates interchangeability. It facilitates interlining agreements. It facilitates going on one carrier and returning by another carrier. There is no reason on Earth to think the practice would have to be abandoned.

Ms. **Ferraro**. You're saying all those can be retained.

Mr. **Baxter**. Yes.

Ms. **Ferraro**. Another person who testified before our committee the other day was Senator Warner, and one of the arguments that we kept hearing from witness after witness was as I think Senator Warner put it, if it ain't broke, don't fix it. They say that we have a good system of ticket distribution. Why take a chance that it will collapse?

And the airlines, according to the testimony that we have, ATA is also concerned that things will not continue as they are without the regulations in place.

Would you comment on that?

Mr. **Baxter**. Well, I'm thoroughly in accord with the general spirit of that statement. But on the other hand, if it is broke, it should be fixed, and in my view the system is seriously broke.

It broke in 1937 and we haven't gotten around to fixing it yet. We have it almost fixed, and there is no particular reason to preserve this particular aspect of our long history of regulatory error in this industry.

Ms. **Ferraro**. I guess my final question, since you say the system is broke and has been broken since 1937, who is complaining about it being broke? The airline industry? Is it the consumer? Travel agent? Who is it?

Mr. **Baxter**. Well, I think primarily it's consumers. But as is often the case, when consumers have never had the benefit of a competitive system, it's often difficult for them to realize precisely what it is that they are missing. We have a system here that confines the distribution of airline tickets to one particular mode, and it's a mode that must be approved by all carriers. No experimentation in different modes of distribution is possible. It's not possible even if one or two carriers think that would be an interesting thing to try and to the advantage of competitors. The air carriers and the existing airline agents as a group have the power to block the majority of them, all different modes of adaptation in this industry to changing circumstances.

That is a clear denial of some of the most important benefits of the processes of competition, different individual enterprises experimenting to find better ways, ways that will appeal more strongly to their consumers, ways that will survive only if they do appeal more strongly to consumers, and here everything must proceed by way of majority agreement. That's broke, in my view.

Ms. **Ferraro**. I want to thank you for your testimony. Your final comments were very interesting.

Mr. **Mineta**. Mr. Packard.

Mr. **Packard**. Thank you, Mr. Chairman.

Mr. Baxter, I, too, appreciate your testimony. Do we have a significant number of industries in the country that have been granted antitrust immunity?

Mr. **Baxter**. You mean that have antitrust immunity at the present time, or have been granted antitrust immunity at one time or another?

Mr. **Packard**. No, that have it now.

Mr. **Baxter**. Very, very few, really. We have still some degree of antitrust immunity in the transportation area for carriers of different types. Under section 5 of the Interstate Commerce Act in the case of surface carriers, and this residual immunizing power of the CAB.

There are a few others that I could think of: the commodities futures trading group. But they are really very extraordinary.

Mr. **Packard**. Normally, criteria what would need to exist in order to justify the granting of antitrust immunity?

Mr. **Baxter**. I should think one would have to carry the burden of showing that the industry could not function in a satisfactory way in a competitive regime.

Mr. **Packard**. And in your judgment, according to your testimony, that does not exist in this situation?

Mr. **Baxter**. In my judgment, that does not exist in this case, and indeed, it's interesting that not even the hearing examiner before the CAB found that that condition existed. He took exactly the opposite attitude that the burden of proof was on the other side, that someone had to come in and convince him that things would be better in a competitive regime, or he was going to hang on the old anticompetitive regime.

In our view that was the wrong standard for him to have adopted.

Mr. **Packard**. In your judgment, can an industry that has been granted antitrust immunity abuse that immunity?

Mr. **Baxter**. They most certainly can. I'm not sure exactly how to take your question. Simply by operating within their immunity, quite consistently with what Congress intended when it conferred the immunity, they can nevertheless charge monopoly prices to consumers and exploit consumers in a variety of ways and I would regard that in a sense as an abuse of the immunity. And yet it really isn't an abuse of the immunity, as long as they're acting within the scope of the law as Congress created it.

It's a different question to ask whether they can sort of push on the edges of the immunity and do things that Congress never really contemplated and in that sense abused the immunity by pushing beyond it. And I'm not certain which question you really intended to ask me.

Mr. **Packard**. In your evaluation of this particular immunity that's been granted—in your judgment—has there been any abuses?

Mr. **Baxter**. Well, of course, the immunity you're referring to is an immunity that was as broad as the industry itself for many years. And yes, at least in the first sense, there were abuses. The industry endeavored to keep ticket prices too high. The ticket price for any given passenger to be taken, let us say, from New York to Los Angeles was substantially in excess of the actual cost of carrying the passenger. And as a consequence, the airlines engaged in a variety of forms of competition, rivalry with one another that did not really redound to the advantage of consumers. And they fancied up the flights in various ways, since they weren't able to engage in price competition, because they had an immunity from the Board, and, indeed, were required to refrain from price competition. All sorts of other ersatz forms of competition occurred until they had dissipated the excess profits they were collecting.

The most important of those forms of ersatz competition was scheduling too many flights, and load factors were much too low in the United States. For years and years load factors were down below 50 percent on our trunk carriers, and now with the deregulation that Congress put into effect several years ago we see load factors climbing to levels that are much more nearly appropriate. And that kind of waste in this industry is being eliminated.

That's the kind of abuse of the immunity that one gets without transgressing the lines that Congress has drawn.

Mr. **Packard**. Thank you, Mr. Baxter. Thank you, Mr. Chairman.

Mr. **Mineta**. Mr. Rahall.

Mr. **Rahall**. No questions.

Mr. **Mineta**. Mr. Stangeland.

Mr. **Stangeland**. Thank you, Mr. Chairman, I may reserve my right to submit questions for written responses if it might be permitted since I haven't had a chance to read the gentleman's testimony.

Mr. **Mineta**. Very well.

Let's see, Mr. Weber, I believe you were here first. I'm sorry.

Mr. **Weber**. Thank you, Mr. Chairman.

Mr. Baxter, I guess I want to begin by asking you sort of a philosophical question that I think is appropriate to this. We're talking about establishing a freer marketplace in the airline industry. And yet it seems to me that antitrust regulation in and of itself, by its very nature, is an intrusion into the marketplace and a regulation of the marketplace.

Am I incorrect in thinking that?

Mr. **Baxter**. I think that's a fair statement, Mr. Weber. There are various forms of intrusion into the marketplace. Markets by and large work very well completely unregulated, but there are various kinds of market failures that sometimes come along and call for governmental intervention.

One kind of market failure that has much been in the press recently is the set of environmental problems we face, where people can in effect impose costs on other people by the way they dispose of their garbage, and I use the word garbage in a very broad, generic sense.

And that's a kind of market failure that calls for governmental intervention quite appropriately. And a different kind of market failure that calls for governmental intervention is the ability of a group of producers who recognize one another's interests to get together and form a cartel, and thus, collectively impose an unfavorable trading result on their customers. And that's the particular form of market failure to which the antitrust laws are addressed.

But yes, it represents a form of intervention.

Mr. **Weber**. That's very helpful. Without passing on the accuracy of your characterization of the current arrangement. The point I want to make, though, is really what you are proposing is not the elimination of regulation, but the imposition of regulation.

Mr. **Baxter**. Well, I don't know. One can articulate it either way, I think.

Mr. **Weber**. Well, clearly in the absence of any kind of antitrust laws to begin with, the industry would be able to form whatever organizations and associations it wanted to and that would be pure free market. That's sort of what you have when you have antitrust laws but you're immune from them. And so lifting the immunity amounts to an effort to shape that marketplace in a different way which conforms with certain decisions that the Government's made about how it would like to see that marketplace look. Correct?

Mr. **Baxter**. Yes, I think that's a fair characterization. This is a situation in which the CAB has essentially authorized a cartel to impose an unfavorable trading result on consumers and you could call the removal of immunity a form of intervention.

Mr. **Stangeland**. Would the gentleman yield?

Mr. **Weber**. I'd be pleased to yield to my colleague.

Mr. **Stangeland**. A cartel of whom?

Mr. **Baxter**. Of the airlines and the existing set of agents.

Mr. **Stangeland**. But if they form a cartel to the disadvantage of me, the consumer, I can go to the airline desk and pay the same price for the ticket that the travel agent sells me. Is that to my detriment? The airline sets the price. And if I don't like the travel agent, if I don't like his price, I go to the airline. But I would pay the same price.

Mr. **Baxter**. The airline sets the price no matter where you get it.

Mr. **Stangeland**. OK, but then the cartel is not to the disadvantage of the consumer, is it.

Mr. **Baxter**. No, I think it is.

Mr. **Stangeland**. How?

Mr. **Baxter**. Because there is a very, very wide variety of arrangements through which tickets could be distributed. We would see agents of different abilities and different specializations in a system where everything did not have to proceed in accordance with majority vote.

Mr. **Stangeland**. But I beg to differ. The travel agent today has to provide me service. If he doesn't provide me service, I can go to another travel agent, or I can go to the airlines.

Mr. **Baxter**. That's correct.

Mr. STANGELAND. So I don't think this is a disadvantage to the consumer, and I thank the gentleman for yielding.

Mr. WEBER. If I could reclaim my time. My colleague from Minnesota has made my point better than I made it. The point I'm trying to make is we have a system right now in which certain advantages are made available to consumers. The main advantage in my judgment, as Mr. Stangeland pointed out, being we have an excellent system of personal service for airline passengers from travel agents.

Now, the point I want to make is, the decision we are being asked to make here is should we support the decision of the Government to intervene in that marketplace and change it because they think there are other priorities than personal service from travel agents that are more important?

Now, isn't that a correct characterization, really, of what you're trying to advocate?

Mr. BAXTER. No, even then I don't think it is, because the personal service aspect of it is itself subject to a lot of variation. We might find that we had a system where some agents provided less by way of personal services, but other agents provided substantially more because they were able to do it in a different organizational framework of some sort.

Everything would not be homogenized in accordance with the wishes of a majority vote of the existing participants in the industry. And whether more personal service, less personal service, different personal service, different delivery terms, or different price structures might arise from changing those systems is very difficult to say in advance.

All one can say for sure at the present point in time is that the industry is permitted to proceed by way of a Government-sanctioned cartel.

Mr. STANGELAND. If the gentleman would yield.

Mr. WEBER. I'll yield to my colleague from Minnesota again.

Mr. STANGELAND. When we talk about service, and I don't want to denigrate any major corporation and I hope that my words will not be construed in that way. But suppose that we open this up, and in your own words this would of course permit each airline to deal or not to deal with any ticket seller it unilaterally chooses.

Now, let's suppose that Penney, Montgomery Ward, Sears get into the business. I've got Burris Travel Agency—did have, and Mr. Weber has it now, in Alexandria. I've got Quamy and Morehead, I've got Horvick and Morehead. Small businessmen providing me personal service. And they're going to provide me a lot better personal service because that's what their livelihood depends on; their business depends on that personal service.

If I have to deal with somebody in Penney or Montgomery Ward or Sears, I become a number. I may get service. But I may not get service. And I think you are going contrary to the interests of the consumer by advocating not passing this legislation and letting the CAB rule.

And I really do think that, Mr. Baxter. I think we are getting service, and we have a choice, we have an option. I think—maybe I'm misguided—that if I want to get in the travel business, I can.

It's not a closed field. Now, maybe it's difficult for me. And I don't know all the steps I'd have to go through to do that.

But I really think that we have a system of good customer service, and the final result is what the consumer pays for. And as I said before, he pays the same to the travel agent as he pays at the desk.

I think you're wrong. And I thank the gentleman for yielding

Mr. **Weber**. I thank my colleague for his excellent points. I also thank you, because contrary to other people from the administration I have had an opportunity to talk with a little bit, I think you have honestly portrayed the nature of antitrust regulations.

We, obviously, have a difference of opinion on this, but at least in my own mind, I think we've established on the record what it really is we're talking about here, and that is the administration's attempt to change the nature of this industry, not by the lifting of a regulation, but by the imposition of a regulation.

What we ought to be talking about is not whether we want a free market or not, but whether we want to change the nature of Government regulation of this marketplace to meet the objectives that you have discussed, or whether there are other objectives that we in the Congress think are more appropriate.

Before I conclude, I have just one more question that I would like to ask, and that refers to some of the questions, the line of questioning that the gentlelady from New York pursued.

You referred in your testimony and under question to a number of areas that you said would still be immune from antitrust prosecution: common ticket stock, interlining, the clearinghouse arrangements, things like that.

Mr. **Baxter**. I didn't use the word immune, but I understand what you mean.

Mr. **Weber**. OK. My point is we've had testimony before this committee to the opposite effect and obviously it seems to me one of the drawbacks of the change is that those disputes will have to be determined, or settled through the court system. Is that not correct?

Mr. **Baxter**. No, I don't believe that is correct. I would suppose that the Congress became fairly accustomed to hearing conflicting testimony.

Mr. **Weber**. If I may interrupt, then you're not only saying that it is your judgment that those areas are not going to be affected by your action, but you also feel fairly confident that reasonable people elsewhere in the country who may have reason to bring suit will not disagree with you?

Mr. **Baxter**. When they get around to putting their money where their mouth is and incurring the expense of bringing suit on the basis of those asserted antitrust violations, I suspect they'll reconsider.

Mr. **Weber**. I appreciate your judgement there; in the unfortunate case that we go ahead with this, I certainly hope you're right. But I don't share your confidence

Anyway, I would like to thank you for being responsive to the questions.

I have no further questions, Mr. Chairman.

Mr. **Mineta**. Thank you, Mr Weber. Now, I know what they mean by the Minnesota Twins. It's Mr. Stangeland and Mr. Weber.

Mr. Anderson, our distinguished former chairman of the Aviation Subcommittee, and author of the bill.

Mr. **Anderson**. Thank you, Mr. Chairman.

Mr. Baxter, I'm curious about your continued use of the word exclusivity and what your definition of this term would be. Now, I'm sure, Mr. Baxter, that you're aware that under the Yoder decision, and even under the system as it has evolved today, that the consumer has a number of alternative means to buy travel at the retail level starting at the most simple level, I guess, where he or she can pick up the telephone and just order it directly. It can also include the use of home computers to order tickets, and to a broad number of other options, including Ticketron-type operations. Frankly, it is almost limitless the number of other possibilities which have not yet arrived in the marketplace.

How can you possibly call that exclusivity?

Mr. **Baxter**. The arrangement calls for exclusivity, and requires all of the carriers to market their tickets through agents selected in accordance with these selection procedures. It's true that the hearing examiner created a rather inexplicable and ad hoc exception for Ticketron——

Mr. **Anderson**. And any other company that fits in that same pattern. There may be a hundred Ticketron-type organizations.

Mr. **Baxter**. Except that nobody knows what that pattern is. So far we have an exception for one distributor by name, which it seems to me is a grossly inappropriate way for any governmental agency to proceed.

But who else if anyone fits in that category which was left wholely undefined in the examiner's opinion, I, at least, do not know.

Mr. **Anderson**. Well, you can just pick up a telephone and order a ticket right now. Anybody can buy a ticket over the telephone. There are no restrictions whatsoever.

Mr. **Baxter**. No question about that.

Mr. **Anderson**. Or you can walk across the street to the Longworth Building and purchase a ticket from the combined airlines ticket office [CATO]. They are not travel agents.

Also, there are numerous other types of organizations—which are in no way related to travel agencies—that sell tickets. It's not an exclusive market. The impression I got from hearing you is that a buyer has only one option, through a travel agency, to purchase a ticket. This is simply not the case.

Mr. **Baxter**. There are several.

Mr. **Anderson**. I have no further questions.

Mr. **Mineta**. Mr. Wolf.

Mr. **Wolf**. Thank you, Mr. Chairman.

In a perfect world, and we have an imperfect world, probably a lot more imperfect than we would like it to be and maybe it's even becoming more so, I guess a lot of what you say would maybe be more valid, if things were just that way. I mean, we have marketing orders in our society which I can't quite understand whereby they go and cut down every fifth tree. We have marketing orders in certain areas of the country whereby for certain crops we do certain things which hurt the consumer.

They are generally not gone after because of political clout, and also because if you look at it from the other side, from the farmers' point of view, he makes a very, very good point

We have the situation with regard to farm programs, wheat support programs that aren't quite perfect the way we would like. If we could just do away with everything and go back and begin again in 1776 I think we would change a lot of things. Maybe every State would have right-to-work laws. Maybe they wouldn't. I don't know.

I think our job here is, and I'm not a cosponsor of the bill, and I want to hear what the witnesses have to say. The travel agents from my district have been in to see me. I represent northern Virginia. There are probably as many travel agents in northern Virginia as anywhere. My constituents travel.

My job is to represent the consumers of my district. And in turn, the constituents of my district, whom many are travel agents.

What data do you have that you could furnish us to say that if your position held firm, what would happen to the travel agents? What would happen to that woman who had just gone out into business 3 or 4 years ago and then is just beginning to make it, and has a couple of kids in college. What would actually happen?

Mr. BAXTER. Well, of course, there is no data. Neither we nor anyone else have any data that can answer that question, Mr. Wolf, because this is an industry that has been regulated since its technological inception. This is an industry that has never functioned in a competitive regime.

And so we have to look at other industries with analogous capital structures performing analogous functions, and see how they function under competition and make the best predictions we can how this one would function.

Mr. WOLF. Well, what are the predictions as to the economic impact on them?

Mr. BAXTER. Yes. The best prediction I can make is that if the individual carriers were free to experiment, which they are not at present, that they would experiment with a variety of different ways of distributing airline tickets, some of which were less costly, and would result in lower air fares to passengers.

Some might well be more costly and would result in higher air fares to passengers, but accompanied by more services, or something else that customers liked.

It's even conceivable, although I think quite unlikely, that after a little bit of experimentation all of the airlines would decide that, by golly, the way the tickets were distributed during the years of regulation turned out to everyone's amazement to be absolutely the best way to distribute tickets, and of course they would all go back to that because it would be unprofitable to pursue any of the failed experiments further.

We do not know. All we know at the present time is that the distribution in this industry is ossified to a single mode. That's an overstatement, because, as the gentleman pointed out a minute ago, it is possible to order tickets directly from the carrier. You're less likely to find out about other carriers that have flights about the same time if you do. But it is a possibility, and there are corporate travel offices, and there are Government travel offices. But so far as the public is concerned, there is essentially one kind of travel agent, and no other kinds are permitted. Individual airlines are not permitted to experiment; individuals are not permitted to experiment outside that set of parameters. And my prediction is that if those restrictions, restrictions that derive from their mutual agreement among one another to proceed by way of majority vote, were removed, we would see experimentation, and that some of those experiments would lead us to ways that were better for consumers, and as, indeed, as I've indicated, they would only continue to exist if that were the case.

Mr. WOLF. Well, you know I think—and I respect your position on that—I think you really haven't answered it, and I guess nobody has, the data as to what it would actually do. I'm sure the travel agents will come along and paint a case, perhaps even an extreme case, but I would have liked to see some data from the government as to what they thought.

Too many times, and I just left the floor where they were debating the covert aid. And I get so sick and tired over there, everyone talks concepts and principles. And they always seem to forget the people.

I mean one side is against the guerrillas, and the other side is against the Marxists, but nobody talks about the people in El Salvador that are really fighting for their freedom. They talk about 30 days cutting off and we can do this, but nobody gets down to the people, and I think—I would like to know what this really does to the people. It's perhaps a jerry-built system, but perhaps the system is such that it's working fairly well and maybe we ought not change it.

I, again, still have not made up my mind, but I think I am concerned about what the impact would be.

I might say, so the travel agents don't sit out there and think well I guess Wolf has made a decision, then, he's going for the travel agents, let me just ask you one other question: On page 19 of the CAB's testimony, it really offended me on this one statement.

They said travel agents believe they have the power to influence carrier decisions. When United proposed a flat commission, the editor of Travel Trade praised the retaliatory action agents took against United, and they, quote: Remember how quickly United's business melted away under the bright lights and heated reactions of travel agents in response to the plan which have eroded their commission percentages with each inflationary rise in air fares. It is, quote, the editor's hope that this experience taught every airline that when they try to take something away from travel agents which is rightfully theirs, you run the risk of having agents place their ticket sales—and then it goes on and on.

I think, assuming this bill may pass, and I expect that it may and I may support it, what is the law now with regard to this type of economic boycott, and if there isn't any specific law, is there any recommendation that could be made? Because I think when you get a situation like this, if a travel agent's doing that and an airline wants to make it 9 percent rather than 10, not take away their business, but provide an opportunity for a constituent, a consumer to get a better deal.

And you know, everyone that travels is not rich. You have military personnel, PFC, it may be a widow going back to bury her husband or something like this.

Is there any law against this? Is there any violation? And if not, would there be any recommendation of any language that would prevent this type of economic boycott? It's kind of like what the unions used to do. When they didn't like Campbell soup, they would say don't buy Campbell soup. I find that kind of thing repulsive.

Is there anything you can do with regard to that?

Mr. **BAXTER**. If it were not for the immunity, the antitrust immunity, a collective horizontal boycott among agents of a particular carrier would be a violation of section 1 of the Sherman Act.

I must say I have not examined the question of whether the existing antitrust immunity which does apply to the horizontal arrangement between the carriers, among the carriers and among the agents, could reasonably be construed to shelter the kind of boycott you just described.

Mr. **WOLF**. Could you look and see and provide the committee with any language, because my general impression, and I'm just speaking for myself, is this bill probably will pass. I think it will and I haven't even heard the travel agents in the audience yet. I think there probably is going to be a pretty good case that maybe this bill should pass.

I'm sympathetic to what Mr. Stangeland said about the large companies coming in. They're not going to come in maybe in Sweet Apple, Ohio, but I think they will come in like the vendors around here. You'll have one at Tyson's Corner, one at Fair Oaks, and one up in Prince Georges County, and maybe put all travel agents out of business, and I'm not so sure that's a good idea.

So I'm kind of inclined from what I've heard, and after talking to Senator Warner, who has talked to me about this a number of times, to probably support the bill.

On the other hand, I would like to know if I do support the bill if you could furnish some language that would at least be a stick whereby we couldn't have this type of, this editor apparently felt very good after he wrote this, but I'm not so sure that was in the best interests of our consumers whereby we could attempt to, and I don't know if the committee would agree, but when the time came I could offer an amendment which would prohibit this type of activity, an economic boycott of a particular carrier.

Mr. **BAXTER**. You're talking about prohibiting collective action by the agents against carriers?

Mr. **WOLF**. A concerted one. I think each carrier, each travel agent, if that were their decision, that they didn't for whatever reason did want to do that, then I really don't think you can change that.

Mr. **BAXTER**. But concerted action against a carrier.

Mr. **WOLF**. Flyers, newsletters.

Mr. **WEBER**. Would the gentleman yield?

Mr. **BAXTER**. How do you feel about concerted action by carriers against an agent?

Mr. **WOLF**. I would agree, both ways. Yes. I'll yield to the gentleman from Minnesota.

Mr. **Weber**. I just want to make this clear because apparently it's your intention to at least consider an amendment or something of this nature. And while I agree with your sentiments about the activities, all you described really was a trade publication editor's comments, and the question I would like to direct to Mr. Baxter, that may not be nice activity, but that does not in and of itself constitute a boycott, does it?

Mr. **Baxter**. If a number of agents had agreed that all would prefer some carrier other than United in response to United's change of a commission rate, yes.

Mr. **Weber**. The point I'm making is a publication, an editor, voicing those opinions is one thing, and that's quite different than having a number of agents get together and make some kind of conscious decision they're going to boycott an airline, right?

Mr. **Baxter**. The mere fact that an editor voices an opinion, of course, is of no antitrust significance whatsoever.

Mr. **Weber**. That's my point. I thank my colleague for yielding.

Mr. **Wolf**. I would just like to add, in the Wall Street Journal of June 14, 1983, there was a paragraph which says:

> The airlines also fear retaliation by travel agents if ticket sales are opened up. The agents have exercised their clout in the past. When five carriers cut commissions to 9 percent from 10 percent to trim costs last year, agents threatened to book customers on other airlines. The carriers gave in a month later.

And it goes on.

But I think in protection for the travel agents, I would like to see it the other way around. If any of the carriers were to boycott a particular travel agent, so I think it ought to cut both ways.

Mr. **Baxter**. Now, you want to protect the people who are presently agents from this type of collective decision making by the carriers?

Mr. **Wolf**. I would like to see some language which would protect the consumer and would be able to give some teeth to the Justice Department to act should carriers do this or should agents, ticket agents.

Mr. **Baxter**. How about agents who are not yet—people who only want to be agents? Can they be boycotted by the carriers?

Mr. **Wolf**. I would like to have your comments. I really don't have an answer.

Mr. **Baxter**. And when we get through eliminating the set of things you've described, you will totally have eliminated the antitrust immunity that we're talking about.

Mr. **Wolf**. I don't think so.

Mr. **Baxter**. Those are precisely the things that it permits.

Mr. **Wolf**. No, I don't agree with you, Mr. Baxter. I think that would be for us to make a decision. I could tell you were trying to lead me down the primrose path. That's why I gave you that I don't know. I'm not setting myself up as an antitrust expert. I am a lawyer, but I'm not an antitrust expert.

I think you can, having been out in private practice, having represented corporations that have been involved in situations like this, it is not an antitrust violation when there is a concerted effort of a certain number to boycott in a certain area. Now if within the private association you can say I don't desire to buy that product, but I'm looking for a protection to deal, and I would be glad to furnish it to you for the record. I will make a copy and give it to you before you leave, the CAB testimony that talks in terms about this situation here. I would like narrow language dealing with a situation which would protect a carrier, if the carrier in good faith, simply to offer lower prices, lower prices, wanted to drop it from 10 to 9.

Mr. **Baxter**. We'll take a look at that if you'll send it on to us, Mr. Wolf.

Mr. **Wolf**. I'll give you a copy right now.

I thank the Chairman.

Mr. **Mineta**. Mr. Hammerschmidt, do you have any further questions?

Mr. **Hammerschmidt**. No questions.

Mr. **Mineta**. Mr. Weber, do you have any questions?

Mr. **Weber**. I don't have a question, Mr. Chairman, but I do want to make a comment that is just a personal comment and I don't want Mr. Baxter to think I'm beating up on him a lot. But I did discuss this with the staff a little bit, and it irritated me. You know, we didn't get your testimony until you sat down. And I realize you have time deadlines, and so do we and all that. But it does make it a little bit difficult for us, and it particularly makes it very difficult for the staff of the committee that really does utilize the time that they're given to review testimony in advance.

So I would just urge you and your colleagues in the administration and else where to try and be as sensitive as you can to the needs of the committee for testimony in advance.

Mr. **Baxter**. Mr. Weber, you're quite right, we were very tardy in getting it out. There was an administrative foulup within the Department of Justice as to whether I was to come or whether I was not to come. And I did not know myself until 10 o'clock this morning whether I was to come or not to come, and I do apologize for that, and we'll try to get that straightened out.

Mr. **Weber**. Thank you, Mr. Chairman.

Mr. **Mineta**. Let me thank you very much, Mr. Baxter, for being here. As you indicate, the on again off again nature of your presence today gave us a few causes for concern.

Now, let me thank you very much for your testimony and for your responses to the members' questions.

As you can tell, this legislation is generating a great deal of interest here on the Hill, and so we do appreciate very much your being here today.

Thank you very much

Mr. **Baxter**. Thank you, Mr. Chairman. It's a privilege to have been here.

Mr. **Mineta**. We are expecting a call to vote momentarily, and so we will recess and reconvene following that vote. I would assume that that vote was going to be starting at around 2:30, and so it should be coming shortly.

We will reconvene 15 minutes after that vote is concluded. Thank you.

[Whereupon, a short recess was taken.]

Mr. MINETA. The subcommittee will please come to order.

We are pleased to have at this time Mr. Richard Knodt, president of the American Society of Travel Agents. Mr. Knodt, your full testimony and statement will be made a part of the record at this point

[Statement referred to follows:]

TESTIMONY OF THE AMERICAN SOCIETY OF TRAVEL AGENTS, INC. BEFORE THE HOUSE OF REPRESENTATIVES SUBCOMMITTEE ON AVIATION OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

July 28, 1983

on

GOVERNMENT REGULATION OF RELATIONSHIPS BETWEEN AIRLINES AND TRAVEL AGENTS

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TESTIMONY OF THE AMERICAN SOCIETY OF TRAVEL AGENTS, INC. BEFORE THE HOUSE OF REPRESENTATIVES SUBCOMMITTEE ON AVIATION OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

July 28, 1983

Mr. Chairman, the American Society of Travel Agents, Inc. (ASTA) is the world's largest trade association of professional travel agents, with approximately 10,000 domestic agent members and a total worldwide membership of agents and suppliers exceeding 18,000. We appreciate the chance to address you about issues that are of paramount importance to the ability of travel agents to continue marketing and selling air transportation and other services to the public in an efficient and professional manner. Public confidence in the United States integrated air transportation network, the best in the world and one that we believe the Congress intended to keep when it passed the Airline Deregulation Act, is in jeopardy. Only action by this Congress can assure the continuation of that system.

SUMMARY OF POSITION

The Civil Aeronautics Board's decision in the Competitive Marketing case creates four major problems: (1) by allowing multiple classes of persons holding themselves out as "travel agents," the decision sets the stage for widespread public confusion about which agents represent which carriers and the validity and flexibility of the tickets they issue, (2) by permitting business travel departments, who are customers of airlines and not their agents, to force their way into the status of conference agents, the decision renders the conference system unworkable and defeats one of its primary purposes, (3) by removing antitrust immunity, the decision tolls the death-knoll for the conference agency programs - their standards cannot be maintained without protection from repeated antitrust attacks against conference participants, (4) by holding, without basis, that the Area Settlement Plan is an "essential facility" under antitrust principles, the Board has invited antitrust assaults against the uniform remitting procedures which, at any time, could be held to be per se antitrust violations due to "fixing of credit terms."

The CAB is taking an enormous risk with the country's transportation system. The question for the Congress is whether it wants such risks taken with the distribution mechanism that made airline deregulation possible. The most serious problems have not yet occurred, of course, largely because the CAB's decision is not fully effective until 1985. But the problems are foreseeable - they exist not because of consumer dissatisfaction but because dedication to theoretical economics has overridden reasoned decision making. If the Board's theories are to be the foundation of national transportation policy, then we ask the Congress to so decide.

H.R.2053 would restore the Administrative Law Judge's decision as the final decision of the CAB. No one who could enter the ticket distribution market under the Board's decision would be foreclosed from entering by the Judge's approach. The key difference in this regard is that the Judge's decision would limit public confusion, would permit the industry to operate more efficiently and would prevent the adoption of "let the buyer beware" as the consumer's watch-word when dealing with travel agents. Consumers should not be left to lawsuits for remedies when the harm can be largely prevented in the first place.

H.R.2053 will not restore or create a monopoly. Under this bill accredited travel agents will not be the only people who can sell airline tickets. Innovations of all kinds, including new technologies, can be utilized whenever their time comes, without the need of government approval.

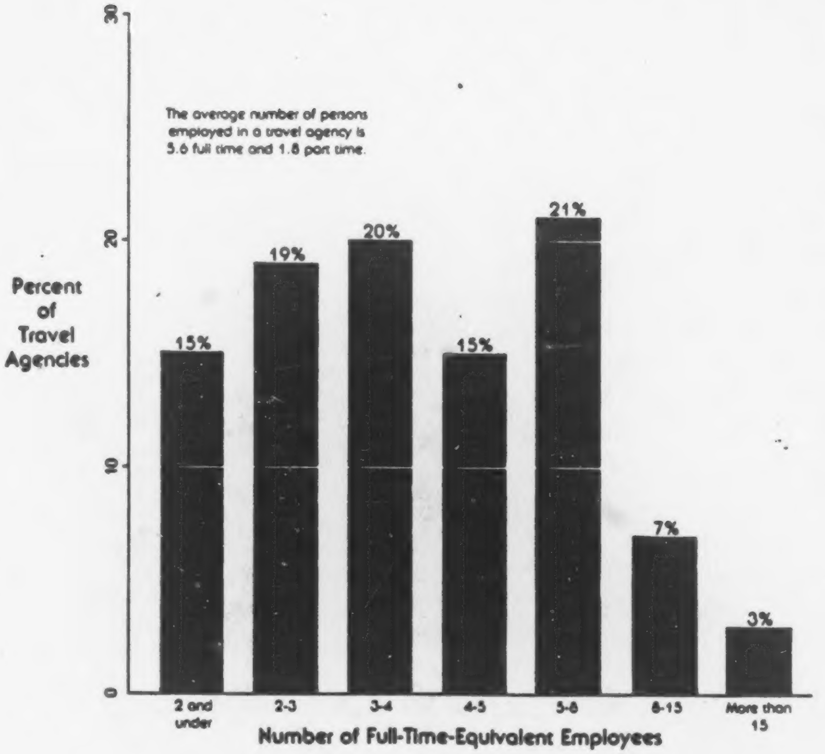
From the viewpoint of the travel agent, and the rest of the air travel and tourism industry as well, the risks entailed in the CMI decision are unwise and unnecessary, where a reasonable, balanced alternative exists that will open the market to new innovation while assuring that the existing agency network is retained. If the Board's assurances that there is nothing to worry about prove wrong, and realistic analysis of the legal and practical issues so indicates, a terrible disservice will have been done to the industry and the public. The more prudent course is embodied in H.R.2053, which ASTA supports.

I. Airline Distribution is Big Business Sold By Small Buiness.

Like most travel agents, the overwhelming majority of ASTA's agent members are very small businesses. Average full time employment in our industry is about six persons per agency. The Small Business Administration classifies travel agencies as "small business" if they have gross commission revenue under $2 million.

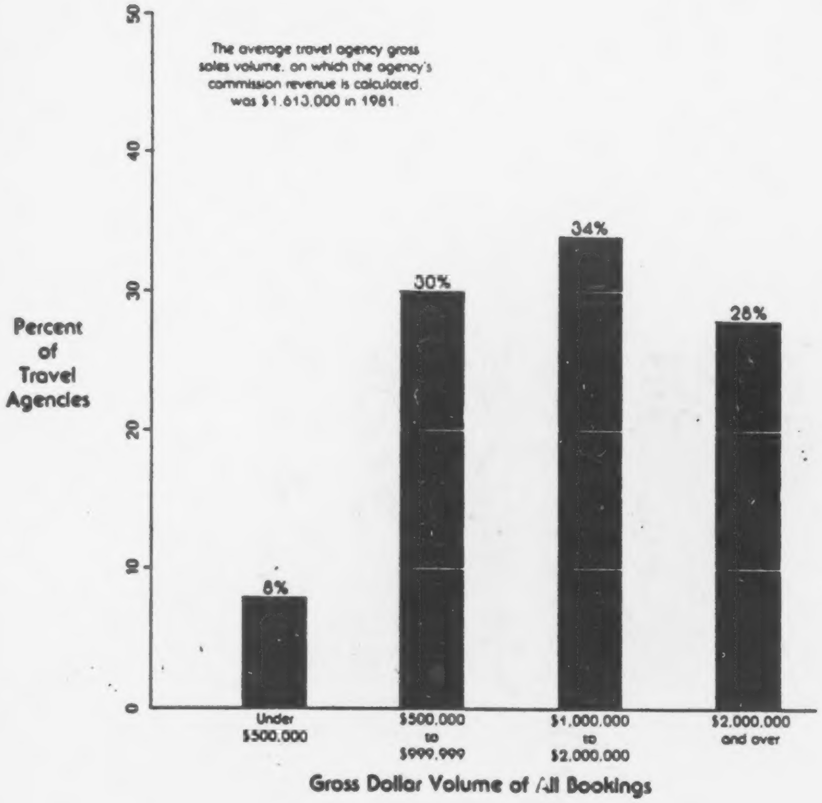
On that basis almost all agents are small businesses. The charts following graphically show the basic characteristics of our industry.

Number of Travel Agency Employees



Sources: The U.S. Travel Agency Market 1981, Louis Harris & Associates
Joint Travel Agent/Airline Economic and Value Study, Touche Ross & Co., 1978

Travel Agency Sales Volume

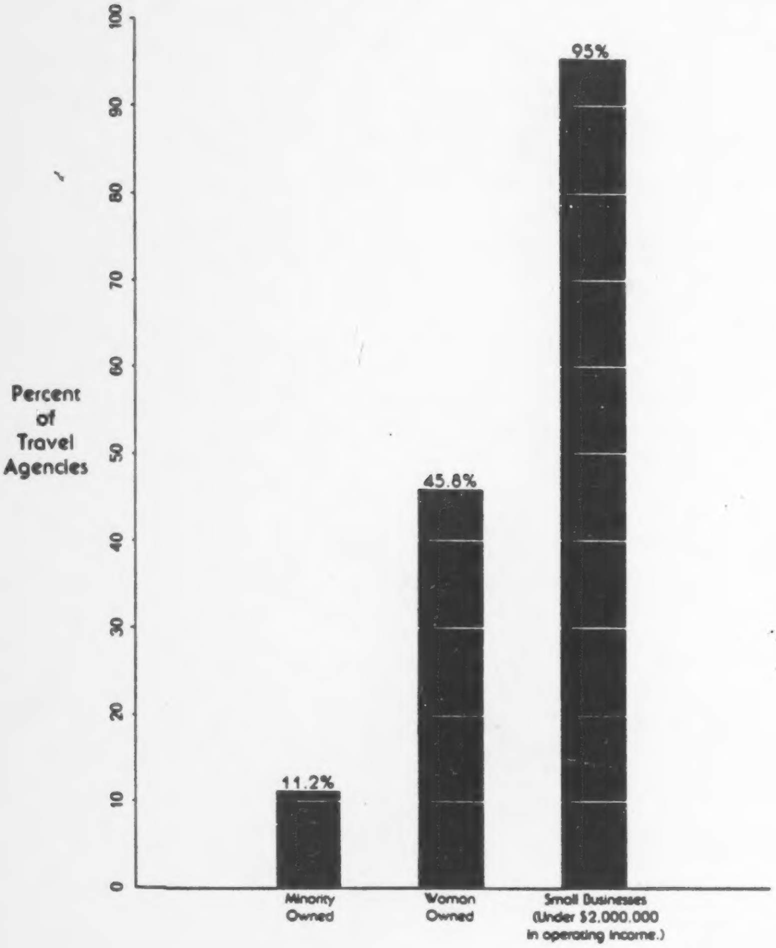


The average travel agency gross sales volume, on which the agency's commission revenue is calculated, was $1,613,000 in 1981.

Source: The U.S. Travel Agency Market 1981, Louis Harris & Associates

Although agents share the trait of small size, we are proud to note the diversity of opportunity that has existed in our industry under the professional accreditation standards that we discuss in this testimony. A very thorough survey conducted in October, 1982, showed that 46 percent of travel agencies are owned by women and that 11 percent are owned by minorities. Because of the accreditation system that results in automatic appointment of each qualified agent by all conference airlines, each new agency, regardless of its assets, starts business with equal access to all airline "inventory".

Travel Agency Ownership



Source: ATC Survey, October 1982

II. Uncontested Public Benefits of the Industry Agent System are Threatened.

We are before the Subcommittee today because of the recent decision of the Civil Aeronautics Board in the Investigation into the Competitive Marketing of Air Transportation. That proceeding was an investigation of intercarrier agreements designed to give the industry an efficient, shared distribution system of retail agents that is of enormous benefit to the industry and the travelling public. These agreements provide a centralized process for common accreditation and appointment of travel agents that is extraordinarily efficient. Because all travel agents must meet a specific set of minimal professional experience and financial integrity qualifications which are acceptable to the airlines, the airline parties to the agreements are enabled to accept each others' agents with a minimum of expense. The airlines are thus able to recognize and honor the tickets issued by such agents, facilitating the provision of interline transportation throughout the country and the world. A summary of the primary accreditation standards appears on the next page.

SUMMARY OF TRAVEL AGENCY ACCREDITATION STANDARDS

FINANCIAL -- ATC: Bond ranging from $10,000 to $50,000 depending on sales volume and working capital.
IATA: Minimum working capital of $15,000.

PERSONNEL -- Owner or manager have at least two years experience as travel counselor or manager in passenger transportation business, must demonstrate knowledge of Travel Agents Handbook, and must be employed full-time on agency premises.
One full-time employee (can be the manager, above) must have at least one year experience in the last three years in airline ticketing with a conference carrier or accredited travel agency.

LOCATION -- A location must be set aside for the sale only of travel services, freely accessible to the general public, and open at least 35 hours per week. (IATA requires only that the office be open on a regular schedule).

SERVICE TO THE PUBLIC -- Agency must do at least 80% of its business with the public (i.e., cannot do more than 20% with itself). No commmissions paid for ticket sales to agency owners or employees.

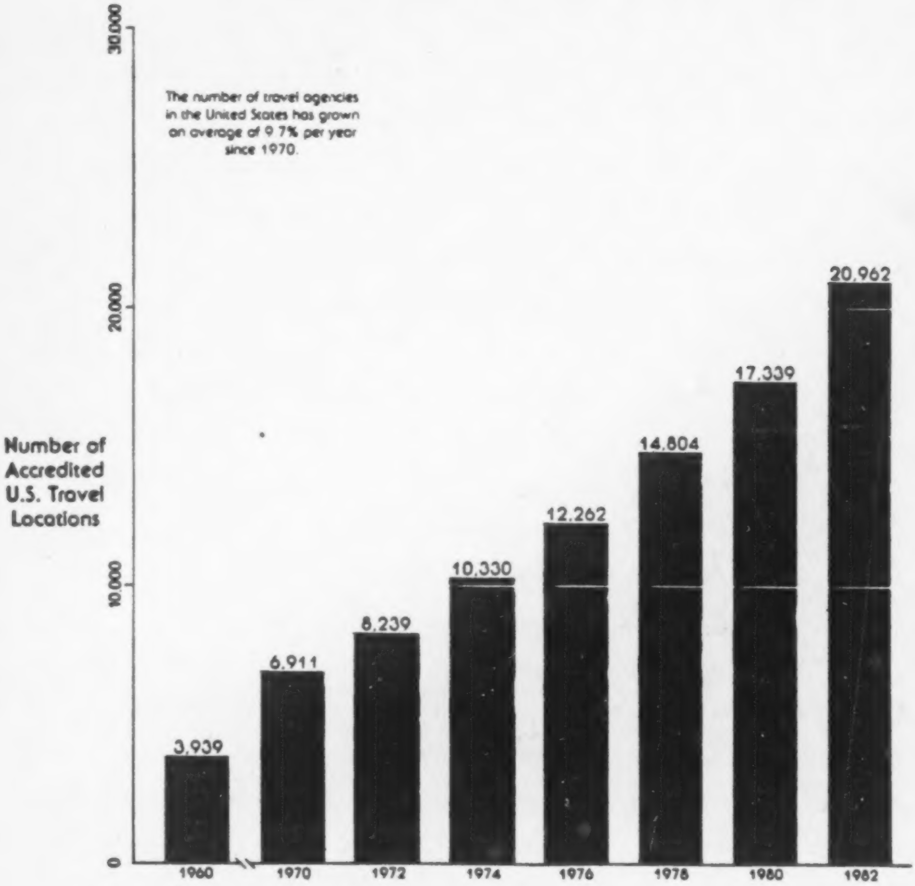
TICKET SECURITY -- Agents must comply with strict rules for protection of unused ticket stock. Supply of blank stock is limited.

The integrated nationwide network of travel agents that is produced by the agreements has evolved, with the oversight and approval of the Civil Aeronautics Board, over a period of forty years. This system has served the airlines and the public exceptionally well. It lowers costs and helps sustain demand. It is extremely competitive and at the same time remarkably stable. The number of travel agent locations has grown steadily and rapidly to the point where there are now more than 22,000 accredited agency locations throughout the United States.

The agency industry has experienced substantial entry by new competitors and great diversity in the marketing approaches taken by individual agents. Agency failures occur at an extremely low rate. Even when an agent does fail, the tickets it has issued are honored by the conference airlines. Conversely, because the airlines can rely on a common system of agents, they have been able to guarantee substitute transportation for the public on agent-issued tickets when an airline ceases operations.

The system thus provides the public with greater security in dealing with the airlines through their agents and provides the airlines with a stable distribution network that now accounts for more than half of all airline sales. The extraordinary stability and rapid growth of our industry is depicted on the following pages.

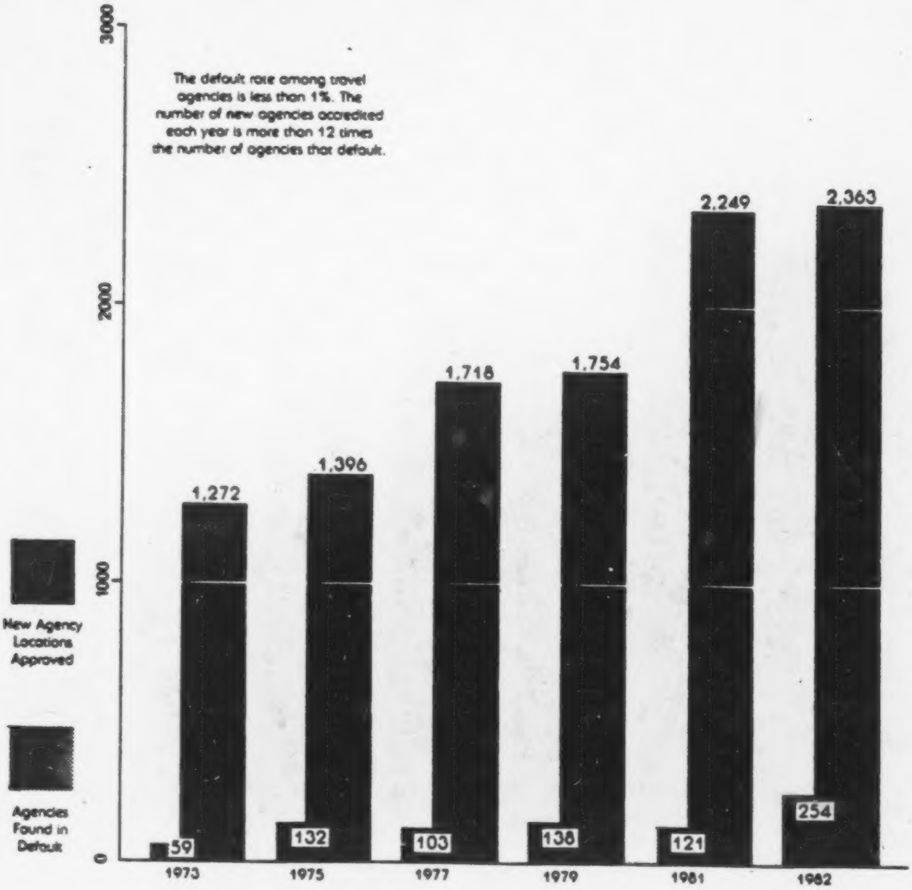
Growth in U.S. Travel Agencies



The number of travel agencies in the United States has grown on average of 9.7% per year since 1970.

Source: Air Traffic Conference Data

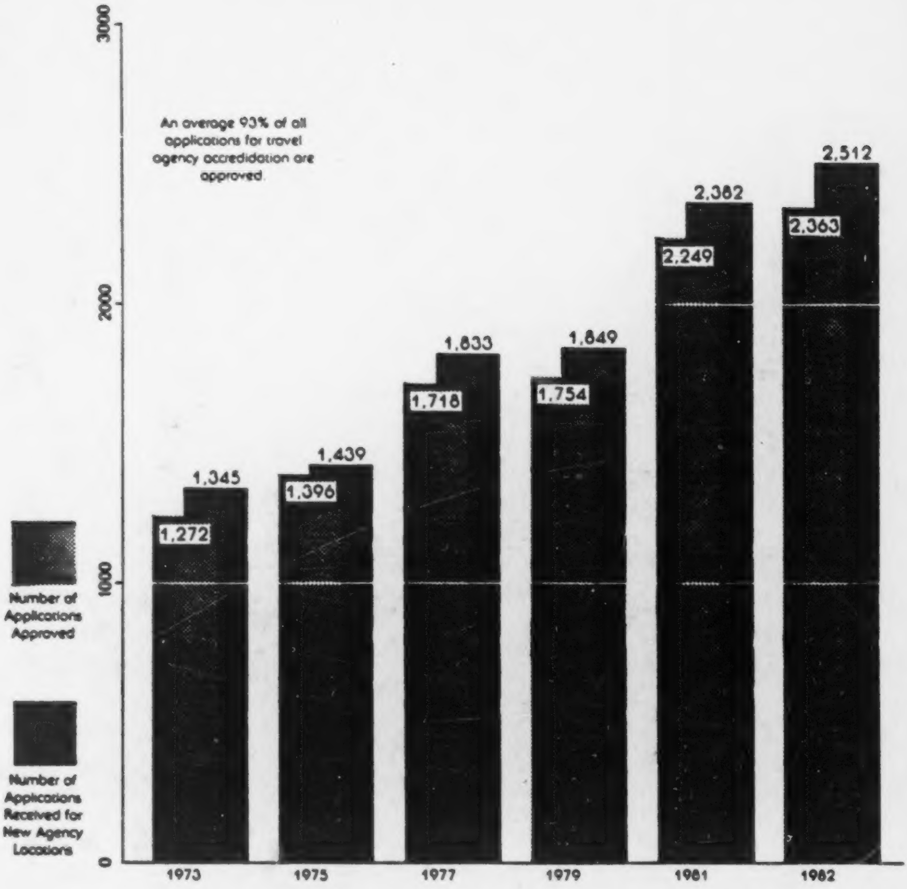
New Travel Agencies
vs.
Travel Agency Defaults



The default rate among travel agencies is less than 1%. The number of new agencies accredited each year is more than 12 times the number of agencies that default.

Source: Air Traffic Conference Data

Applications For New Travel Agency Locations



An average 93% of all applications for travel agency accreditation are approved.

Source: Air Traffic Conference Data

In view of this record it cannot reasonably be argued that the conference rules have prevented new competitors from entering the airline distribution market. The old conference rules fostered a reliable, efficient and productive distribution system for the benefit of airlines and consumers alike.

III. The Industry Agent System Promotes Competition and Made Airline Deregulation a Practical Possibility.

The agency system created by the agreements has promoted competition in many important ways and in particular has contributed to the ability of the airline industry to make the transition to a less regulated environment as contemplated by the Airline Deregulation Act of 1978.

In an increasingly confusing, and often chaotic, market, the fully representative industry travel agent, representing 150 airlines throughout the world, is a source of complete and objective information for consumers without parallel in other industries. The industry agent has likewise made it possible for existing airlines to enter new markets with maximum efficiency by providing such carriers with a pre-existing network of agents that already represent the new carrier. In addition, the network helps new airlines get started - they have immediate access to a national distribution system on equal terms with established carriers, thus avoiding an enormous financial burden in start-up costs. Travel agents also facilitate airline price competition by keeping track of, explaining and making available to the public, the wide variety of discount fares offered today. The conference system thus promotes airline competition and minimizes public inconvenience from the free entry, exit and pricing that were the goals of airline deregulation.

IV. The Judge Who Heard the Evidence Supported Continuation of the System while Opening the Door to Still More Entry and Innovation.

An Administrative Law Judge, who presided over the trial of the Investigation for the Board, recommended that the key features of the agreements be retained. This experienced Judge heard the testimony through 90 hearing days and personally studied all of the evidence and briefs objectively.[1] He recognized that the loss of the conference system for accrediting agents would severely impact the operation of the deregulated market for airline services.

The Judge held that the provisions requiring all agents to be accredited under the agreed-to standards were essential to maintain an efficient and integrated air transport network, especially one which would continue to provide interline transportation, a unique public benefit. The Judge also found that the accreditation system should apply only to persons acting as agents on behalf of the airlines, thus permitting entry into the retail ticketing business by firms interested in a non-agent or traditional retailer relationship with the airlines. He approved the Area Settlement Plan through which almost 100 million traffic documents are settled annually between agents and airlines.

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[1] The Summary of Conclusions from the Judge's Initial Decision is attached to this testimony as Exhibit A.

Finally, the Judge concluded that the agreements must continue to receive antitrust immunity, as they have for the past four decades, in order to continue operating effectively. This so-called "immunity" protects the airlines from civil and criminal attack against conduct that the government has administratively approved as "in the public interest."

The airline parties to the agreements, the travel agency industry, and the only firm that appeared to seek entry as a ticketing retailer accepted the Judge's approach as reasonable and balanced. It sustained the vital elements of the agency network while allowing new opportunities for innovation.

V. A Divided Board Overruled Its Judge Based Only on Economic Theories.

A. The Decision

The Civil Aeronautics Board itself by a divided vote, overturned the recommendations of the Administrative Law Judge and struck down the key provisions designed to hold the system together. The Board concluded that the provisions requiring all agents to be accredited should terminate immediately with respect to sales on a single carrier on a given itinerary. The uniform accreditation requirement was also ended immediately in cases where two or more airlines agreed to allow interline sales by unaccredited agents across their lines.

The Board also disapproved, as of January 1, 1985, the standards designed to limit accreditation to persons interested primarily in engaging in a public business as an agent for promotion and sale of the airlines' services, as distinct from airline customers interested primarily in dealing for their own account and using agency accreditation as a device to obtain discounts from prices that airlines would otherwise charge. Without reference to the public confusion that would result if non-conference agents obtain access to standard agents' ticket stock, the Board ordered that the Area Settlement Plan must be opened to any ticket seller desiring to participate. Finally, the Board stripped all of the carrier marketing agreements of all antitrust immunity as of January 1, 1985, and indicated that many parts of the agreements would have to be changed in order to avoid antitrust attacks in the future.

Thus, while the both the Board and the Judge sought new avenues for entry and innovation, the Board eliminated the vital elements of the programs that the Judge had sustained to assure the survival of the public benefits of the accreditation programs. And, after three and one-half years of review, the Board exposed the agreements to an open-ended, indeterminate compulsory legal process as the real means of deciding what the agency programs may properly contain.

B. The Rationale

The Board did not decide the CMI on the basis of substantial evidence that the agency system has failed to meet some significant market demand, or that consumers were dissatisfied, or that the programs are frozen and incapable of change to meet new market conditions. No such findings could have been made on the record developed before the Board. The entire basis for the Board's objection to the Judge's recommendations is economic theory.

The Board saw the central issue as one of deregulation versus regulation. It had earlier concluded that the conferral of antitrust immunity was inconsistent with deregulation, even though the Airline Deregulation Act continues indefinitely the authority of the Board to grant such immunity. The Board's desire to strip the immunity from the agreements led it to eliminate provisions that it believed, for the same theoretical reasons, were not sustainable without it, regardless of the public transportation benefits that those provisions secured.

The Board also interpreted the agreements-review section of the Federal Aviation Act (Section 412) in a way that placed an impossible burden on proponents of the agreements. This is clearly revealed in the following passage from the Board's opinion:

> The dominance of travel agents in ticketing airline services is not in itself objectionable. If this market position were achieved or persists solely because of the efficiencies of the existing distribution system vis-a-vis other options for purchasing tickets, there would be little basis for challenge under antitrust standards. However, with the exclusivity provisions in place we cannot find that this is the result of the normal operation of market forces but must instead presume that present industry-wide agreements are dictating marketing structure.

Under this rationale, as long as the mandatory accreditation rules were a reality, as they have been for decades, any accreditation agreement would have been condemned. Since the market observed by the Board in the CMI did not conform to the market that the theoreticians thought would have existed in the absence of the agreements, the Board, although it could point to no market demand that had gone unmet and to no evidence of competitive failure or monopolistic pricing, rejected the agreements before it.

This is neither the approach nor the result that the Congress intended when the agreement-review and antitrust immunity sections of the Act were amended in 1978 and 1979. The Board's recognized enthusiasm for completing the deregulation process must be measured and overseen by the Congress when matters affecting the basic structure of the industry are involved. This is especially important where the Board itself is facing near-term extinction and will thus not be available to deal with long-term consequences of its decision. Conversely, the deadlines established by the Board's decision effectively foreclose any successor agency from reviewing the Board's action in a timely manner.

C. There Was No Problem That Required This Solution

The Board says that there is nothing to worry about - the marketplace will take care of everything; nothing serious has happened since the Board's decision, the most efficient business will prevail, consumers will get what they demand and so on.

These economic cliches, as seductive as they sound on the surface, miss the point entirely. Travel agents face more competition from new entrants to our business than any service industry in the country. We are not strangers to competition, as the historical record clearly shows, and we have not based our objections to the CAB's decision on the claim that the business of professional travel agents should somehow be protected.

It was in fact market forces that led the airlines to create the agency accreditation programs in the first place and to build their marketing systems around them. If there has been any restraint on the development of marketing alternatives, it has been the CAB's own regulation of non-agency ticket distribution (such as charters, contract bulk fares and similar innovations), and not the accreditation programs, that has been the cause. We did not oppose the introduction of contract bulk fares into the industry - we did point out the risk of consumer confusion and the CAB decided to regulate disclosures to assure that the public understood what was being offered to them.

The market forces that led the carriers to rely upon accredited agents as their primary distribution channel still exist. They are evident in the demand of the airlines for mutually agreed-upon professional standards that enable them to share the entire agency network and that promote public confidence in that system. They are also present in the increased reliance placed upon the professional travel agent by the travelling public during the confusion over fares and services that has marked the road to airline deregulation. The accredited agency distribution system thus meets the needs of the airlines that pay for it and the consumers who rely upon it.

But the fact that demand for the services of industry agents continues to exist does not mean, as the CAB has argued, that the airlines will spontaneously adhere to the conferences as long as doing so serves their interest. The problem with the Board's decision is that it removes the legal regime necessary to assure that the supply of industry agents, a unique creation of joint action by competitors, can continue to be offered. These difficulties have not yet materialized, of course, because, among other things, major elements of the decision have not taken effect.

The CAB argues that the so-called agency exclusivity provision is nothing more than a transparent scheme to protect accredited agents from competition while serving no meaningful role in generating the public benefits of the accreditation program.

Can it be that simple? Who or what are agents protected from? The number of agency locations doubled over the past eight years. In 1982, while the programs were still in full effect, five new agency locations were opened every day on the average. It is very difficult, to say the least, to imagine a situation producing more competitive pressure on agents. And we emphasize that the Judge's decision that we support would allow new forms of ticket distribution to enter the market, including, but not limited to, the single largest retailer of tickets of any kind in the United States.

Perhaps, then, the problem is the alleged predictability of the form that agency competition takes, as the CAB suggests. Again, an open-minded look at the actual marketplace shows extraordinary diversity in the marketing of agency services. We have agencies that tend to specialize in different types of markets: vacation travel, commercial travel, packaged services; or who emphasize different geographic destination markets as areas of special expertise; or who tend to serve specific segments of the market, such as individually planned touring itineraries, ethnic groups, commercial customer in-plant services, and so on. Today's agents offer a vast and varying array of individual services such as ticket delivery, travel cost effectiveness reporting, dedicated staff, WATS lines, 24-hour service, guarantees of lowest fares, on-site service, to name a few. And agents who have emphasized one type of market or service in the past are branching out into new areas, always challenging the other agents with whom they compete. No, predictability cannot be the real problem because it simply doesn't exist.

The Board appears to be saying that the real problem is that the airlines have given up their freedom of choice. The Board believes that the competitiveness of the air transport system depends upon each airline being free to appoint its own exclusive agents or to agree with one or a few other airlines to share semi-exclusive agents.

As theoretical matter this seems not unreasonable. But this rationale first overlooks the fact that the agency agreements have been entered into and maintained voluntarily by the airline participants. And those carriers are today defending that free choice they made, as a deliberate and valuable trade-off necessary for the preservation of the cooperative airline services that benefit the public and all carriers in return. Thus, the Board's decision seems largely based on a well-meaning but misguided effort to "save the airlines from themselves."

And on a closer look, what is the real benefit? It would certainly permit, as the Board has advocated, any airline to appoint anyone it likes to act as its agent when its own financial condition has begun to impair its market position. But this prospect raises several serious questions.

Will such unaccredited agents have the same incentive as accredited conference agents to fully inform their clients of the risks affecting the public's money and expectations in such cases? If nonaccredited agents will make the same disclosures as industry agents accredited by the conferences, then the rationale for allowing them to operate (airline-self-defense) makes no sense. If non-conference agents are not going to inform the public of these risks, is the public welfare improved by allowing such persons to hold themselves out as travel agents? If such "agents" gain access to standard agents' ticket stock, how will the public distinguish between the interlinable traffic documents issued by industry agents and the restricted tickets issued by the new group?

As a society we do not ordinarily allow companies in financial difficulty to operate free of the normal restraints on deception and unfair practices, just as we do not allow them to unilaterally disregard their obligations to protect the safety of the public. Thus, even if it were true that everyone in the industry has an incentive to act responsibly, fairly and rationally, a naive concept disproved by all of our industrial history, the accreditation programs as approved by the Judge assure the industry and the public that, as to agents, there will be no departure from professional standards in the accreditation process. But it is also true that under the Judge's approach, any failing or distressed carrier can hire anyone to dispense its tickets to the public, save only that they not purport to be a "travel agent."

Travel agents and airlines alike are opposed to opening the door to unprofessional conduct in our industry. We have no incentive or desire to drive any airline from business - quite the contrary, agents are better off, our jobs are easier and our profit opportunities better, when the airlines we serve are profitable, stable and vigorous. At the height of the financial battering that the airlines experienced during the 1981-1982 recession, ASTA vigorously supported the creation by the airlines of the Default Protection Plan. Under the DPP the purchaser of a ticket issued by an accredited agent is assured by conference airlines that substitute transportation will be provided if the ticketed carrier ceases operations. The DPP protects the public and the industry and, significantly, was the recipient of antitrust immunity from the CAB. Agents also supported changes in ATC procedures that would assure that an agent's choice of airline identification plate for ticketing purposes was as competitively neutral as possible, thus avoiding manipulation of airline cash flows for the benefit of a handful of airlines at the expense of the rest.

We have built a system that gives all airlines, new and established, equal access to a national distribution system that assures each carrier of its fair opportunity to gain passengers based on the competitive value of its services and fares. The airlines and the public have a high level of confidence in that system and nothing should be allowed to undermine that confidence by benefiting a few at the expense of many. The success of agency distribution depends on more than the existence of a complex marketplace. Yet economic reality suggests that the CAB's goal of having non-conference agents in the market will be achieved only by eliminating the professional standards that have protected the public under the accreditation programs.

ASTA fundamentally opposes a return to "let the buyer beware" as the standard for service in airline distribution. There are, of course, other ways of trying to deal with that situation. That is why agents strive to develop and maintain professionalism through education-and-training programs. But it is generally true that you can't make a silk purse from a sow's ear. It is necessary to start with a minimum base for entry - and that is most efficiently provided through the centralized administration of the conference agency programs. The loss of that minimum base of standards, the inevitable result if non-accredited agency relationships are developed, will raise the cost of other efforts to maintain professionalism while diminishing the positive results of those effects.

Mr. Chairman, we are well aware that the CAB has labelled our view "apocalyptic." This is not so. Nothing we have described is going to "destroy travel agents." We're here to stay and most of us can adapt to the market that, as the CAB often notes, we know best. That is not the problem. What is likely to happen is more mundane than that, but no less serious.

VI. The Economic Harm Arising From the CAB Decision is Direct and Imminent.

A. The Impact of Allowing BTD's to Force Their Way into the Agency Programs

The CAB's decision to strip the airline accreditation agreements of their antitrust immunity will, in our view, have severe consequences for the industry and the public. The Board itself has noted that business travel departments, in-house divisions of large corporations that write tickets and make reservations for their parent firm (basically in-house purchasing departments), have been trying to force their way into the status of accredited agents under the programs. They seek this not because they want to be agents of the airlines in any meaningful sense but because they are customers who seek discounts that airlines have thus far been unwilling to grant voluntarily.

Without antitrust immunity, the ability of the airline conferences to limit the agency program to real agents, *i.e.*, persons who stand in the shoes of the carrier and deal on its behalf with the public, is in grave doubt. If the BTD's, as they are called, are successful in forcing their admission to the programs under threat of antitrust lawsuits, which they have repeatedly made, the airlines, in order to retain the programs, would have to deal within the conferences with their agents and with their customers, the BTD's, at the same time, and the airlines will have to do so subject to the constant threat of antitrust attack. We see no practical way that the conference process can be continued under these circumstances.

Alternatively, the conferences could refuse to allow any input by affected parties, thus cutting off the right of agent participation that the CAB required of the conferences years ago to assure fair play for agents affected by the collective action of the airlines. Of course, the agents would have the right to challenge conference actions under the antitrust laws too.

The problems with this approach are painfully clear to those of us who have participated in the development of these programs. The entire accreditation system, and the many benefits that flow from it, depend upon an atmosphere of cooperation. We despair at the notion that the conferences can continue to function under a reign of antitrust terror. Moreover, the travel agency community would not willingly accept a regime in which its right to participate in conference processes is curtailed and the remedy for grievances is an antitrust suit.

B. Other Sources of Antitrust Attacks

The conference participants, including travel agent representatives exercising rights to make input to conference decision-making, would also be exposed to antitrust attack from other sources. Although the Board appears to be saying that the airlines are free to recreate the equivalent of conference agency exclusivity through bilateral rather than multilateral agreements, the reality is likely to be quite different. Even if the airlines were able otherwise to continue using only accredited agents for interline purposes and if exclusive distributor-agents are not employed, any person who can not or will not comply with conference standards would be able to sue the conferences, and perhaps anyone who participated in conference discussions, alleging a "group boycott" in violation of the Sherman Act. A single successful attack of this kind could lead to a wave of similar claims. Every conference meeting would be fraught with antitrust exposure, making continual cooperation on matters of common interest exceedingly costly or impossible.

The Board says that such antitrust claims will be frivolous and are therefore of no concern. But again the reality is that no court will be bound to follow the Board's view of what is frivolous and what is not. Individual courts and juries, making the "rule of reason" balancing analysis traditionally applied to such claims, could quite possibly find one or more of the jointly-set accreditation standards a restraint of trade, in spite of any statements to the contrary in the CAB's decision. And as time passes, the weight likely to be given to the Board's opinions will diminish in any case. Since most antitrust precedent has been developed in industries quite different from air transportation, the guidelines for acceptable conduct in many areas will remain unclear through years of costly litigation.

Moreover, the Department of Justice has already indicated its dissatisfaction with many provisions of the conference programs that the Board did not disapprove. DOJ has also filed with the CAB its strong opposition to new ATC resolutions designed to help the public and the airlines understand who they are dealing with under the regime created by the CMI and to permit the conference to continue enforcing its rules as to accredited operations. DOJ now appears to be saying that after 1984 no agreements of any kind, not even bilateral interline agreements, can properly contain understandings as to what kinds of agents are acceptable to each interline partner.

Taken together with DOJ's continued opposition to agreement provisions that the CAB in fact approved, it seems that DOJ is reverting, in practical effect, to its original position before Judge Yoder - that the agency programs, even without exclusivity, are anticompetitive and should be discontinued. ASTA had alerted the CAB that DOJ's asserted "change of position" following the Judge's decision was more tactical than substantive. Now that DOJ has made clear its opposition to conference efforts to enforce its accreditation standards, there is little room for doubt that DOJ wants to destroy the agency programs - not by overtly seeking CAB disapproval, but rather by creating uncertainty through threat of litigation and thus preventing the conferences from operating in a meaningful way.

C. The Congress Has Intervened in Analogous Circumstances

Such uncertainty comes with a high cost. The history of United States export trade is illustrative. In 1918 the Congress enacted the Webb-Pomerene Act to provide partial antitrust immunity for export trade in goods so long as the activity did not restrain trade or depress prices in the United States. The purpose was to encourage firms otherwise forbidden from acting in concert to pool their resources and assist one another in selling abroad.

In the 1930's Webb-Pomerene associations accounted for almost 20 per cent of American exports. However, by 1979 only 33 of the 150 such associations that were created since 1918 had survived, and accounted for just 2 per cent of total U.S. exports. The Congressional committees investigating the U.S. export problem in 1981 found that one of the most significant reasons for the decline was the "chilling effect" of the federal antitrust laws as applied to cooperative exporting efforts. As the Senate Committee on Banking, Housing and Urban Affairs reported,

> The vagueness of the Webb-Pomerene Act leaves uncertain what activities will constitute a substantial restraint of domestic trade. As a result, the threat of antitrust litigation has served as a deterrent to broader utilization of the Webb-Pomerene Act.
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> This theme arose frequently in the 1981 hearings, as several business witnesses and attorneys commented on the difficulty of obtaining definitive antitrust guidance from the Justice Department and on the uncertainty Justice's ambiguity created for businessmen, small businessmen particularly, who cannot afford the time and cost of defending themselves in a suit, even if they might ultimately prove successful. [S. Rep. No. 97-27 at pp. 18-9]

Even though the Webb-Pomerene Act provided an exemption from the Sherman Antitrust Act for certain export trade activities, the scope of the exemption was limited and unclear. Consequently, cooperative exporting efforts were continually subject to actual and potential antitrust challenges, from both the federal government and private plantiffs. The legal uncertainty created by the Webb-Pomerene Act was described by the House Judiciary Committee as follows:

> The hearing record suggests a second, related problem -- possible ambiguity in the precise legal standard to be employed in determining whether American antitrust law is to be applied to a particular transaction. There remains...some disparity among judicial interpretations and between those interpretations and executive enforcement policy regarding the quantum and nature of the effects required to create jurisdiction.
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> For example, the Business Roundtable believes that "[j]udicial decisions are rife with inconsistencies regarding the types of effects on the domestic economy that must be demonstrated in order to establish U.S. antitrust jurisdiction over an international transaction." ...The Roundtable goes on to note that "[t]he commentators are also divided on the correct test to apply".
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> The committee need not chose between these competing views to conclude that legislative clarification is appropriate....[E]ven if different formulations have not led to divergent results, the possibility of divergence in results certainly exists....Businessmen and antitrust counsel cannot safely ignore the current differences in formulation. H.R. 5235 will provide assurances against private plantiff's successfully proposing different standards than those employed by the Department of Justice.[H. Rep. No. 97-686 at p.6]

It was in response to such uncertainties in the antitrust laws, and their dampening effect on cooperative export trading activities by U.S. firms, that Congress passed the Export Trading Company Act of 1982 (P.L. 97-290). The ECT Act both broadened the antitrust immunity previously granted by the Webb-Pomerene Act (for example by including joint exporting of "services", not just goods, within the Act) and adopted an administrative procedure for assuring firms *in advance of the scope of their immunity*. Exporters contemplating joint trading may now apply to the Department of Commerce for a certificate of antitrust immunity to protect the proposed exporting activities. The grant of such a certificate narrowly limits the antitrust exposure of the approved activities, for example by barring any criminal prosecution and restricting private antitrust actions to actual instead of the usual treble damages. The ETC Act also restricted the applicability of the Sherman Act and Federal Trade Commission Act to export trade. The purpose of these changes was succinctly stated by the House Judiciary Committee:

> The *purpose* of [the Act] is to *increase* the export *trade* of the United States *by encouraging joint activity that will lead to economies of scale* in export operations. [The Act] is a response to sentiment in the business community that certain federal banking and antitrust laws hamper the complete development of American export trade, especially among small and medium-sized businesses.
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> Title II, the focus of this Committee's action,is intended to *minimize any antitrust uncertainty* in joint export activities....A successful applicant receives a certificate that will greatly reduce any exposure under the domestic antitrust laws. These features are particularly intended to *encourage joint export activity among small and medium-sized firms*, produce efficiencies and increase American exports. [H. Rep. No. 97-636 at p. 1, emphasis added]

That, Mr. Chairman, is exactly what the airlines and travel agents are trying to do through the conference program.

D. Costs and Benefits of Terminating the Conference Accreditation System

Can our industry survive without similar legislative relief? Of course it can, but only at great cost. Those costs will inevitably be passed on to consumers. Will consumers get something valuable in return? The answer is clearly "no." In any case, there is a big difference between survival and continuing to deliver to the public the integrated air transportation service that it wants and deserves. Small travel agents simply cannot afford to be involved in costly antitrust lawsuits as the price of continuing the conference process, regardless of the benefits that arise from central accreditation.

There are other problems as well. Another feature of both the domestic and international conference is Office of the Travel Agent Commssioner. This office was created to assure fairness to new agent applicants and to those against whom the conferences had brought an enforcement complaint alleging some infringement of the agent's obligations to the airlines. The Commissioner's procedures assure due process to all agents. The Board removed immunity from these programs as well. There is little likelihood that the Commissioner program can continue to function when an attempt is made to enforce collectively-reached standards and rules which lack immunity.

It is easy to say, as the CAB often has, that other industries get along with only the Sherman Act and therefore so can the airlines. The problem is the gap between theory and reality that underlies such generalizations. Many of the "other" industries the CAB presumably has in mind are subject to a vast array of federal and state laws governing their operations, including the Uniform Commercial Code, state and local licensing laws, federal and state safety regulation and many others. The airline industry, on the other hand, is not suitable for that kind of fragmented, product-oriented regime. The distinctive feature of the airline industry is that it not only involves a service in interstate commerce but is heavily dependent on cooperation among competitors to produce joint services that are of unique and enormous benefit to the public. We know of no other industry that depends as heavily as ours upon cooperation to produce such a large share of the total service offered - interline service involving two or more airlines accounts for a third of travel agents' air sales. Other cooperative services are well known to airline travelers, such as the ability of most any airline to accept or refund tickets written on any other airline. It is in this uniquely cooperative atmosphere that the conference agency programs were born, have developed and should continue.

Will the public really benefit from a regime in which a necessarily cooperative system like the agency accreditation programs must be maintained through litigation or the threat of litigation? Will public welfare improve if the successful and publicly accepted industry system of self-control is supplanted by myriad state and local efforts to protect consumers? Both common sense and business sense suggest that the prospects for the programs under this approach are extremely poor.

When the accreditation programs fail, the consequences are clear. Industry costs for distribution will rise, as the expense of reviewing, approving, supervising and enforcing an agency network shifts from the conferences to the airlines. Each airline's effective access to the national distribution system will diminish as the cost of access increases. Carriers entering markets they have never served will find that establishing a marketing presence is much more costly. On the other side of the board, entry by new agents will diminish as the cost of application and compliance with individual carrier rules increases. As some carriers see a short term advantage in trying to establish more-or-less exclusive agency distributors, the diversion of marketing resources by competitors to responsive practices will escalate and commitment to the fully shared agency system will decline. The willingness of the airlines to continue participating in publicly benefical programs such as the Default Protection Plan would likewise diminish. The overall effect on competition in the industry will be negative, as the Judge concluded:

> The difficulty in applying the rule of reason test to determine the legality of the agreements under the antitrust laws, the inability of the Board to give *res judicata* effect to any determination by it in that regard, and the express position of the Justice Department that the agreements in their entirety are anticompetitive underscore the need for antitrust immunity in order to secure the important public benefits dependent upon the agreements and the marketing system they enable and represent.[2]

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> 2/ Opponents' assertion that other industries may not seek relief from antitrust law lacks point, since Congress has determined to continue the possibility of antitrust immunity in the airline industry where required by the public interest.
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> [Initial Decision at 210]

None of these projections is "apocalyptic" - they are the natural and foreseeable consequences of the Board's decision, at least if the Board's rationale has any substance. The Board itself explicitly recognized that use of agents outside the conference programs would be more costly and less convenient. But that does not mean that it will not happen; nor does it mean that it would be "competitive madness" for any carrier to undertake non-accredited agency relationships and start the deterioration process. There is ample precedent in the short-term pricing strategies that have pervaded the airline industry through most of the deregulation process. The entire premise of the Board's decision is that some airline may want to do this and should not be deterred.

Who then will pay the increased costs that result from deterioration or elimination of the accreditation programs? The travelling public will have to pay, of course.

Are there reasonably foreseeable benefits to the public that would not exist under the Judge's approach and that warrant risking the collapse of the conference approach? The Board has not identified those benefits except to say that "competition is best". Although the Board claims that there might be some portion of the market that could be served "more efficiently" by a non-conference agent, it does not identify that "portion", or indicate what aspects of the conference system, as approved by the Judge, would prevent the efficient servicing of that demand. The Board never explained why its enthusiasm for exclusive distributorships could not be accommodated under the Judge's approach, which could avoid confronting the public with "travel agents" who are really only distributors for one or for a few select carriers.

It may be asserted that the Board's approach is necessary to help keep commissions under control by creating a threat of entry by firms willing to sell for lower commissions than agents may demand. But the evidence in the CMI established that at current commission levels, the airlines were getting a genuine bargain in the level and quality of efficient service rendered by the agency system.

It is a fact, of course, that domestic airfare commission rates on the average are higher today than they were in 1978. This resulted from the CAB's decision in 1980 to allow commission rates to be determined competitively. For the prior forty years rates had been set by airline agreement and, as one would expect, those agreements set the rates below the competitive level. When that agreement was eliminated, the rates increased, as was expected. Domestic rates followed the course of international commissions, which were opened several years earlier, by increasing and then levelling off. The current average rate on all agent sales is just under ten percent. The present air commission rate is generally less than rates offered by non-air travel suppliers (such as hotels and car rental firms) who are, incidentally, not subject to any form of exclusivity in their choice of agents to represent them. Airline commission rates thus compare favorably with compensation provided by similar service suppliers and are not artifically inflated by the conference accreditation agreements.

It is also a fact that the airlines' total commission payments to agents have increased since 1978. This is accounted for in part by the rate increases just discussed. But there is another major factor at work, and that is that the travel agents' share of total air transportation sales has also increased, from about forty-six percent of domestic sales in 1978 ($11.4 billion) to somewhat more than 60 percent in 1982 ($21.8 billion). This increase in sales is itself the result, in large part, of the confusion that deregulation has produced for the public. Services are changed frequently, as carriers enter and exit new cities. Yet general public awareness of the details of these changes is very limited. And fares change virtually every day, with airlines offering new fare classifications, eligibility rules, discounts and gimmicks by the thousands.

If one looked no further, it might appear from the numbers presented above that deregulation has been a windfall for travel agents. But let us look beneath the surface of the statistics. The fact is that more than 6,000 new agency locations opened since passage of the Airline Deregulation Act. In fact during 1982 an average of five new locations opened every day. Thus, travel agents have themselves experienced a substantial increase in competition for the public's patronage since the advent of deregulation. And the entry continues - as of last month, the number of travel agency locations doing business in the United States exceeded 22,000.

Moreover, in early 1979 only about 2,000 of the 14,000 agency locations then in existence had installed automated reservations systems. Since then more than 15,000 additional locations have invested in automation at tremendous cost, and the numbers continue to increase. This investment was essential to cope with the staggering changes in fares and services that airline deregulation has produced. While automation is intended to increase productivity, it has, in recent years at least, served as much as an offset to declining productivity caused by the need to spend more time advising clients and by the need to reissue tickets repeatedly to accommodate rapid price changes. An industry investment of this magnitude, involving a 750 percent increase in the number of automated locations in just three years, would not have been possible if commission rates had remained fixed at the pre-1980 levels.

Thus, while individual agents may have experienced improvement in market share and commission rates, they have had to make substantial investments in automation to keep pace with changing market conditions. The agency network has allowed the airlines to shift to travel agents the time and expense of dealing directly with the public in complex transactions and thus avoid huge investments in overhead. The ebb and flow of demand and the task of servicing clients affected by changing prices and services is absorbed to a large extent by the agent. Under deregulation, it is not unusual to reissue a ticket two or three times to reflect changes in fares or itinerary. Under existing commission practices the agent receives only one commission, no matter how much time is spent reissuing or revalidating documents. When prices spiral downward from discount fares, the commission drops proportionally. *No other industry can obtain this quantity and quality of service at a ten percent markup.*

Judge Yoder's approach to the agency programs will provide ample competitive pressure on agent commissions in the future. The new entrants allowed by his decision are the kinds of firms that would have a chance to compete at lower rates than agents require. Unless it can be established that the present agency network is inefficient or is likely to become so in the future, and that has never been shown, it is unrealistic to expect that *agents* will be able to enter the market outside the conference programs at commissions lower than conference agents receive. Indeed, the Board itself found that non-conference agents would be more costly and less convenient than conference agents. The *Judge's decision therefore contributes as much to the "commission control" objective as the Board's decision, but without the risks to the conference agency system*.

VII. *H.R. 2053 Will Accommodate Every Interest Worthy of Concern*.

ASTA's solution to these problems is straight forward, the prompt passage of H.R. 2053, the Air Travellers Security Act of 1983. This bill is designed to accomplish only one thing, but it is vital to the future well-being of the air travelling public and to the industries which serve that public. The bill directs the Civil Aeronautics Board to vacate its decision in the Investigation into the Competitive Marketing of Air Transportation and to replace that decision with the Recommended Order of the Administrative Law Judge who tried the case through 90 days of hearings. H.R. 2053 has the support of the professional travel agency community, comprising almost 17,000 agencies with 22,000 locations in every corner of the nation. Its passage is also endorsed by the domestic and international airline industries, more than 150 carriers linking the United States internally and with the rest of the world. The concern about the CAB's decision is so widespread that leaders throughout the hotel and cruise industries have likewise called for enactment of H.R. 2053.

H.R. 2053 is a short and simple bill on its face. But the issues raised by the Competitive Marketing case are enormously complex and far-reaching. During the three-and-one half years that the case was pending before the CAB, a record of more than 40,000 pages of exhibits, testimony and decisions was produced. The case involved two Administrative Law Judges and spanned the terms of two Chairmen at the CAB. The cost to the industry of litigating the case must be tolled in the millions of dollars. Yet in many key respects the Board has not really made a decision at all - it has left the airlines and agents to face further litigation about the very same standards and procedures that were before the Board in the CMI.

The Competitive Marketing decision is a case of economic theory run amuck, a case of dedication to principle being carried beyond the limits of commercial common sense and business reality. More importantly, the CMI is a case in which the Congress' intent in the Airline Deregulation Act of 1978 has been misapplied to the inevitable detriment of the travelling public and the airline and travel agency industries. Surely in the face of the Board's near-term demise, the Congress must examine in the closest detail one of the most important decisions that the CAB has ever made.

Will enactment of H.R. 2053 prevent business travel departments from being accredited as industry agents? Yes. One of its objectives is to allow the conferences to retain the rules that limit accreditation to firms whose purpose is to act as selling agents to the public. Will these business travel departments be adversely affected? No. It is critical to understanding the agency programs to recognize that they are designed to deal only with conduct within the scope of the conference. BTD's thus will continue to be able to bargain for discounts individually with any carrier willing to do so.

In addition, nothing in the conference rules prevents any willing airline from financially recognizing tickets sold by agents to themselves or their affiliates. The programs merely prevent self-dealing agents from claiming commissions in due course, thereby forcing airlines to assume the costly burdens of individually identifying and screening those tickets. Thus, the conference rule against commissions for self-dealing is designed to reinforce the purpose of the programs to accredit agents for sales to the public, but any carrier wishing to reward an agent for sales to himself or to affiliates can still do so in private arrangements.

BTD's will likely argue that the opportunity for bilateral bargaining for compensation that accounts for their self-ticketing is insufficient because no carrier is willing to compensate self-dealing in any form. If true, this assertion is irrelevant. It also raises the question: what do the BTD's then expect to gain by acquiring the label "travel agents?" Even the CAB acknowledged that it would be wrong for the government to try to force the airlines to pay BTD's.[2]

Unfortunately, both the Board and the Department of Justice have fallen prey to equating "opportunity" with "success" in connection with BTD compensation. Observing that carriers are not generally rewarding self-dealing sales, the Board and DOJ conclude that the market has failed and BTD's need greater opportunity for commissions. But this is not the proper legal test for judging the existence or the fairness of the BTD's bargaining opportunities. While CAB and DOJ theoreticians may believe BTD compensation is a great "innovation",[3] the fact is that there are valid economic and marketing reasons for airlines to resist compensating BTD;s and the absence of such payments does not in any way indicate that

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[2] Additional materials dealing with the arguments made by the National Passenger Traffic Association on behalf of BTD's are attached to this testimony as Exhibits B, C, D and E.

[3] DOJ defines "innovation" as "changs from the existing system or mode of performing services." In DOJ's terms, any change, good, bad or indifferent, can be an innovation.

BTD's lack a fair bargaining opportunity and should be admitted to the agency programs as "agents".

On the other hand, the DOJ view that equates "opportunity" with "success" shows that the conferences are in jeopardy unless H.R.2053 is enacted. DOJ and the trade association of BTD's have repeatedly warned that antitrust suits can be expected if the BTD's do not get what they want after immunity is withdrawn from the programs.[4]

Will enactment of H.R. 2053 protect travel agents or airlines from competition? No. New agents, with diverse goals and in any size, will be able to enter the industry under the conference programs. Non-agent ticketors can likewise enter under bilaterally negotiated contracts with each airline. Airlines will be free to price and market directly in any manner they chose. Conference agents would thus face a withering array of actual and potential competition under this legislation.

Will the continuation of antitrust immunity result in perpetually thwarting the enforcement of the antitrust laws in this industry? Clearly not. In the first place, any conduct outside the scope of approved agreements, and actions necessary to carry them out, is not covered by the immunity at all. For

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4/ DOJ has made similar threatening gestures with respect to the basic accreditation standards. Early in the CMI DOJ asserted that the conference agency programs were anticompetitive even if all exclusivity were removed. Although it later claimed to have mitigated its position, threats continue to emanate from DOJ. Depending on who wins the internal debate over DOJ's ultimate position, all participants in conference processes are exposed to antitrust attack if they decide, even unilaterally, to use only conference-accredited agents after 1984.

example, if members of the Air Traffic Conference were to fix prices at an ATC meeting held to amend the agency program, they would clearly be subject to antitrust enforcement. Second, the government agency with continuing jurisdiction over intercarrier agreements can reexamine the competitive operation and effects of the accreditation agreements at any time that circumstances warrant. Thus, the principles of competition embodied in the antitrust laws are not permanently suspended by H.R. 2053 - the legislation would simply prevent repeated litigation in the courts about the agreements between administrative reviews of the programs.

Finally, will the public be benefitted by adoption of H.R. 2053? It clearly will. The Judge who tried the case was intimately and personally involved in testing the evidence presented by all sides during the lengthy hearings. His ultimate conclusions are the best statement of why the Congress should intervene:

> "[The accreditation] agreements provide a uniquely integrated marketing system based upon the ubiquitous presence of industry travel agents which represent all carriers and enjoy the confidence of the public and carriers alike in their competence and reliability because of commonly administered accreditation standards. The system enabled by those agreements also undergirds and enables the current system of interlining, and interchangeability and refundability of tickets.
>
> All of these benefits depend upon the mutual trust of approximately one hundred forty carriers participating in the system and their trust in the competence and reliability of common agents. If the trust and confidence of the participating airlines in the current integrated marketing system are eroded, the costs to the airlines and travel agents would be substantial. The costs to the public and to the public interest would be enormous."

We urge this subcommittee to examine the issues we have raised and report H.R. 2053 for early enactment.

EXHIBIT A

EXCERPTS FROM INITIAL DECISION
OF
ADMINISTRATIVE LAW JUDGE YODER

SUMMARY OF CONCLUSIONS

The agreements at issue do not in general substantially reduce or eliminate competition. While they provide parameters within which competition occurs, and hence reduce or eliminate some competition, in general they enable and encourage healthy competition; and any reduction or elimination of competition is not "substantial" within the meaning of that term in section 412 of the Act. Moreover, to the extent that the agreements in question reduce or eliminate competition, we find that the agreements are necessary to meet serious transportation needs and secure important public benefits and that there is no showing in the record that viable, less anticompetitive alternatives are available.

The substantial public benefits which have accrued from the agreements at issue during the past forty years can be preserved only if the agreements continue to be approved and continue to receive antitrust immunity. Those agreements provide a uniquely integrated marketing system based upon the ubiquitous presence of industry travel agents which represent all carriers and enjoy the confidence of the public and carriers alike in their competence and reliability because of commonly administered accreditation standards. The system enabled by those agreements also undergirds and enables the current system of interlining, and interchangeability and refundability of tickets.

All of these benefits depend upon the mutual trust of approximately one hundred forty carriers participating in the system and their trust in the competence and reliability of common agents. If the trust and confidence of the participating airlines in the current integrated marketing system are eroded, the costs to the airlines and travel agents would be substantial. The costs to the public and to the public interest would be enormous.

Deregulation has introduced in the marketplace a burgeoning number of changes in carriers serving particular markets, unprecedented numbers of new air carriers, and consequent complexity in fares and service offerings. At least partially as a result of this move toward deregulation, consumers have perforce become more dependent upon the travel agent system for accurate, current, and comprehensive information concerning the service offerings of competing airlines. If the competence, ubiquity or universal representation of travel agents is diminished, consumers will be hindered in obtaining competitive information where and when they need it and will be unable to assess adequately the completeness of the information proffered or the scope of each agent's representation. Interlining, and interchangeability and refundability of tickets, would also be impaired if unaccredited agents representing less than all carriers and having the confidence of less than all carriers proliferate in the marketplace. Erosion of the commonly appointed accredited travel agent system poses the risk of consumer confusion and injury out of proportion to any prospective benefits from the entry of unaccredited or individually appointed agents.

Thus we also conclude that agency exclusivity must be continued if the agreements themselves and the marketing system they represent are to be preserved. If agents can obtain appointment and carriers can appoint without accreditation, the need for accreditation would disappear, its use would dissipate, and the confidence of the public and carriers in the travel agent system would decline. Agency exclusivity is the heart of the conference accreditation system. Without it, conference accreditation and the present marketing system would deteriorate, with no assurance that an adequate, let alone equivalent, alternative could or would arise. Certainly the risk of such consequences is sufficiently great to require caution in mandating changes in the current system, which appears to work too well to justify radical fixing.

On the other hand, we conclude that the ATC agreement should be amended to eliminate provisions for "marketing exclusivity" which prohibit payment of sales commissions to any person other than an accredited agent. This provision is not duplicated in the IATA resolutions, which permit the utilization of non-agents in marketing roles but, like ATC, prohibit the use of unaccredited persons as agents. Since IATA has successfully operated its program without "marketing exclusivity," elimination of that restriction would not seem to pose any threat to the accreditation system itself; and the record suggests that new marketing initiatives may be possible in dealing with non-agents if "marketing exclusivity" is removed. In particular, we anticipate the possible use of Ticketron as a ticket vendor in marketing point-to-point, single segment tickets outside of the Area Settlement Plan, and we require a specific exception to ensure that conference members can obtain such services from Ticketron — as a ticket dispenser and not as a travel agent. Other objectors to the agreements (HATA and ATBB) could be compensated as service suppliers under the current resolutions without impairing their operations or the travel agent system. While NPTA seeks travel agent status for corporate business travel departments (BTD's), by definition they are not and cannot be agents of the airlines and do not want to be travel agents; they can however, obtain compensation for their BTD functions under the Board's decision disposing of Phase 5 of this proceeding (ER-1246).

We conclude that with respect to certain provisions the agreements should be approved only upon condition that specified changes be made to remove unnecessary restraints on competition and better serve the public interest. But the fundamental question presented in this proceeding is whether the complex and interrelated system of marketing air transportation can best function in the public interest in an atmosphere of voluntary agreement between carriers enabling mutual trust, with consensual standards for the appointment and utilization of common agents in the marketing of air transportation. We conclude that the public interest can be served only if that system is preserved. For similar reasons we reach similar conclusions with respect to the Area Settlement Plan and the IATA cargo agreements.

EXHIBIT B

ASTA

American Society of Travel Agents, Inc.

Richard C. Knodt
President
and Chief Administrative Officer

June 8, 1983

Honorable Thomas A. Luken
Chairman, Subcommittee on Antitrust and
  Restraint of Trade Activities Affecting
  Small Business
U.S.House of Representatives
B-363 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Luken,

The American Society of Travel Agents very much appreciated the opportunity to testify before your subcommittee on May 27 on the impact of the Civil Aeronautics Board's recent decision in the Competitive Marketing case. Unfortunately, the hearing schedule had to be shortened due to action on the House floor and a few points were unable to be made. These relate primarily to the testimony offered by the National Passenger Traffic Association. I am submitting the following comments with a request that they be included in the hearing record to clarify certain issues and avoid the possibility of misleading statements going unchallenged.

Initially, it is important to distinguish NPTA's real interest from the general economic arguments on which it purports to rely. NPTA's members have one goal: to force the airlines to compensate them directly for the ticketing services they provide to their own companies. NPTA sees the CAB decision as supporting that purpose, once antitrust immunity for the agency accreditation system is withdrawn, and thus opposes any effort to replace the Board's decision with a result more in keeping with the nature of air transportation services. Standing alone, NPTA's effort to improve the revenues of its members is understandable. Since those companies already had the right and ability to bargain for what they want prior to the Board's decision, however, NPTA's incantation of economic principles must be understood for what it is - an effort to use antitrust threats to gain leverage that will extract from the airlines that which the airlines, in their own self-interest, have been unwilling to pay.

We would also emphasize that most of the testimony supporting the CAB decision presents a distorted picture of the options that were before the CAB and that are before the Congress in H.R. 2053

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and S.764. The choice is not between accepting the CAB decision or endorsing the system that existed prior to the *Competitive Marketing* case. We know of no one who is advocating a return to the pre-*Investigation* agreements. The Judge's decision opened the market to significant new competitive forces and that recommendation is the one supported by the industry, including the entire travel agency community.

Now I will turn to a few specific points raised in NPTA's testimony. It makes much of the fact that commission costs for the airlines have increased since 1978. The suggestion is that there is something out of order here, but the problem with this numbers game is that it has no context. The fact is that commission rates for agency services were fixed by airline agreements for decades prior to deregulation and were held substantially constant for a decade at a time. A cartel-set purchasing price obviously would result in a lower rate than could result if competition set the rate. Thus, when the CAB disapproved the commission-fixing agreement in 1980, rates went up. At the same time, the agents' share of ticket sales increased dramatically as the price/service chaos spawned by deregulation drove consumers to the only objective and informed source of information in the market - the professional industry travel agent. Even at increased rates of commission the industry agent was, and is, a bargain for the airlines. The cost of distribution through agents under deregulated market conditions is well below the costs that airlines would incur if they tried to cope with the demand directly. The increases in commission expenses that have occurred are thus not extraordinary in any sense. At today's rates the industry agent probably represents the best buy in retail distribution in any industry in the country.

NPTA also argues that agents have an inordinate ability to influence carrier marketing plans. Several observations can be made. First, any airline that wants to discipline agents by using BTD's as a compensated alternative distribution service can already accomplish that by granting price discounts to those BTD's. NPTA's interest is therefore already protected by the CAB's decision in 1981 to allow direct airline BTD negotiation of price. Second, since commissions are the price of agency services and since agents are therefore the "market" to which commission policies are directed, it is hardly surprising that the market responds when an airline proposes something that is damaging to the agency distribution relationship. That is the normal way that competition works. In a somewhat different, but related, context, the Department of Justice has recently told the Supreme Court:

> The standard adopted by the court of appeals would impede the flow of information between a manufacturer and its distributors that is crucial to the operation of efficient distribution systems, and thus would injure

> consumer interests that the Sherman Act is meant to protect. Distributors are in a position to obtain considerable insight into their supplier's distribution system and into efficiencies that may arise from either the design of the system or the manner in which it is implemented. Distributors who would benefit from a more efficient system have an incentive to communicate their ideas for improvement to the supplier, and the supplier has an obvious incentive to implement efficiency-enhancing ideas, even if they require terminating some distributors. In practical effect, however, the Seventh Circuit's rule could virtually immunize dealers from termination once a competitor has complained. Suppliers who maintain good communications with their distributors would be rendered powerless to take action against disruptive dealers who threaten the efficient operation of their distribution systems, unless the suppliers are willing to run the risk of incurring treble damages with no opportunity to show the procompetitive nature of their actions. This is not, after all, a situation involving communications between competitors - which is the prime concern of Section 1 - but between persons who are cooperating in the sale of a single product and who have ongoing contractual relationships.

Brief for the United States as Amicus Curiae in Monsanto Company v. Spray-Rite Service Corp., at 10-11.

In the United Airlines situation cited by NPTA, for example, United's unilaterally announced plan would have cut a West Coast agent's compensation on a transcontinental $300 fare by 60 percent! It was to be expected that some agents would then say: "if you don't want to pay me, I don't want to work for you." In fact, however, most agents took no action against United because to do so would have interfered with the needs of their clients. The record in the Marketing case shows, in fact, that United's traffic, along with that of its principal competitors at the time, had started to decline before it even announced the coupon compensation plan! Finally, it is worth noting that no alternative distribution system to travel agents that theoretically could develop under the Board's decision (and not under the Judge's decision) can be expected to react any differently to ill-conceived and unilaterally dictated marketing policies that radically devalue the interests of one party to the relationship.

With respect to the Republic Airlines matter cited by NPTA, this did not involve an attempt to lower commissions but rather a failure to meet rate increases offered by competitors during the period of adjustment following CAB disapproval of the commission fixing agreement. The same witness had earlier acknowledged that any business person in a competitive market would try to get the highest compensation "everything else being equal." This I submit, is only the normal competitive process at work. NPTA's conception of competition is apparently limited to a market that produces the end results it prefers.

As to Frontier's attempt in 1982 to reduce existing commission rates, we have again a case of competition at work. Frontier announced a ten percent across-the-board reduction in compensation to agents. Many agents obviously didn't like it. When many major airlines declined to follow Frontier's lead, the commission reduction was rescinded. Competition among the airlines determined the outcome.

Could the CAB's decision, as opposed to the Judge's decision, change the result of a similar incident in the future? It could do so only if it led to the replacement of most of the agency distribution network with some other form of distribution that could in effect take over the agents' function for significantly less compensation. No one has suggested a realistic way that this could be done - indeed the principal thrust of the Board's defense is that no such thing is going to happen. And, in any case, the market structure permitted by the Judge's decision is equally capable of producing a move toward such alternatives.

In short, the problems asserted by NPTA and the Board as to the present distribution system are not founded on the absence of competition but on the particular results that the competition has produced. But the Board's attempt to restructure the market more to its liking is not what the Congress authorized the Board to do.

NPTA has also represented to the subcommittee that Judge Yoder's decision "prohibited" airlines from appointing BTD's, banks, credit card companies and any other firm "to distribute their tickets." These representations are simply not true. BTD's already issue airline ticket stock, as NPTA's testimony elsewhere states. NPTA's objection is not to its role in "distribution"; it is to the size of its "compensation". As for banks and "other firms yet to be identified", they would have two options under the Judge's decision: qualify as an accredited agency, as some banks and American Express have already done, or enter non-agency distribution relationships such as that provided for Ticketron. The so-called "special exception" for Ticketron is actually nothing of the kind, as the Judge's opinion made clear at pages 22-23, 67-68, 81-83. The Judge recommended what he called a "sui generis exception" for Ticketron only with respect to the "ticketing operations" described by Ticketron - in other words the exception was to refer to the type of operation that Ticketron proposed and not to Ticketron itself. The Judge's purpose was explicitly stated:

to avoid any doubt that operations of that type could be undertaken outside the conference programs.

Having started with a false premise, NPTA then leaps to a wrong conclusion - that airlines are "forced to pay the same 10 percent commission on every transaction." NPTA's own testimony elsewhere states that many transactions are compensated at a three percent commission rate. NPTA Testimony at page 11. And it is undeniably the law that any airline and any agent is free to negotiate any rate for any transaction. It is also a fact that commission rates in this industry, as in other industries, tend strongly toward uniformity. The benefits of "averaging" are familiar to all business. Consumers do not pay different prices in a department store based on whether they used a lot of help or no help from a salesperson. And under the Judge's decision, the door is open for any firm to negotiate a no-advice, no counselling, no-service commission structure with any airline that finds such distribution techniques in its interest.

Of course, it must be recognized that there is no "free lunch". An airline negotiating such an arrangement will want to consider the effects of such arrangements on the compensation requirements of its other, full service, distributors, as well as the costs it will incur when passengers use its reservations personnel to gather information and then buy the ticket from a no-service discounter. The legitimacy of these concerns is well-recognized in contemporary economic literature and is the principal basis for the Justice Department's position in the Monsanto case discussed earlier.

Let me now turn to NPTA's discussion of the relationship between in-plant travel agency operations and BTD's. NPTA's description is apparently designed to prove that the relationship is a sham that benefits the travel agent at the expense of the airline and the BTD. But NPTA's assertions make no sense. For example, NPTA says that the typical in-plant agent retains some of its three percent commission "primarily for allowing the BTD to use its plate". This is nonsense for two reasons. First, the commission is paid by the airline, not by the BTD. Second, why would a BTD pay an agent "to use its plate" when, as NPTA elsewhere discuss at length, airlines readily allow BTD's to possess ticket stock and even write interline tickets. Use of the agent's plate gains nothing for the BTD.

The present economic relationship between in-plant agency locations and BTD's is largely a product of a CAB decision some years ago. The Board held that it was lawful for an in-plant agent to reimburse a corporate client for the use of personnel and other resources already in place in the BTD facility. The amount of reimbursement, which is now completely unregulated, is negotiated and is therefore determined by competition among agents for the in-plant business and by the value assigned by the corporation to the services offered by agents who seek the in-plant relationship. Since the agent remains responsible to the airlines for all operations at such locations, it must assume the same supervisory responsibility there as it does at any other conference approved location, regardless of the technicality of whose "employees" do the ticketing.

NPTA's garbled analysis of in-plant operations is not therefore a product of unwholesome relationships. NPTA's members simply want more money. They object to the willingness of the airlines to have accredited agents service the BTD-produced segment of the market and to the unwillingness of the airlines to directly compensate BTD's for the services they perform.

But there is nothing unusual about this. The airlines own the "product" and are entitled to make the judgment about how best to distribute it. It is simple to assert that the airlines could save some commission expense by paying BTD's to write their own tickets, but such claims do not account for all parts of economic the picture. The airlines know that the spread of corporate discounting will debase the revenue from their highest yield traffic and will spread well beyond the limited membership of NPTA. The airlines will have to make up these losses from their most price-sensitive market, the discretionary traveller. And they know that shifting this business from agents to direct sales to BTD's will lengthen the time between a sale and receipt of the income. Agents remit sales weekly; corporations dealing direct take much longer to pay, which is a substantial economic benefit no where accounted for by NPTA's testimony.

In short, the airlines have plenty of good economic and marketing reasons for not wanting to do business the way that NPTA prefers.

Finally, I would like to clarify the issue of diversion of business from travel agents, since it has figured prominently in the arguments of both NPTA and the Board. We will not engage the Board and NPTA in a numbers game about an estimate made in 1980, especially since we never expected the CAB to consider the estimate as relevant, regardless of its size. The agency community has not based its objections to the CAB decision on the idea that agents' business should be protected from competition and we do not make such claims now. But since the CAB and NPTA have chosen to make an issue of this strawman, the record should at least be accurate.

The estimate of shifts in market share, referred to at page 15 of NPTA's testimony, dealt with the effects of disapproval of the conference exclusivity rules. It assumed that the conference programs would continue to have antitrust immunity, an assumption that obviously cannot be made now. Moreover, the testimony accompanying the analysis explained the reasons why the results were understated. In today's market, the same analysis would suggest a reduction of more than $700 million in agent sales and $70 million in agent revenues on the most optimistic and unrealistic set of assumptions.

Mr. Chairman, we thank you again for the chance to clarify these points and will be glad to answer any questions that you, the other subcommittee members or staff may have.

Sincerely,

Dick Knodt

Dick Knodt, CTC
President, American Society of
Travel Agents, Inc.

EXHIBIT C

FACTS ABOUT NPTA

1. What is NPTA?

   A trade association consisting primarily of some of the largest corporations in the United States, many among the Fortune 500, with sales in the billions or hundreds of millions.

   *The average travel agent employs six people and has gross sales of less than $2 million a year.

2. What do NPTA members do?

   They provide ticketing and reservations services to their own corporations. These departments are called BTD's (business travel departments). They are buyers of air transportation, not sellers (they have conceded this fact to the CAB).

3. What do NPTA members want?

   To obtain air transportation at lower prices that other consumers, based on the claim that their self-ticketing services save the airlines money.

4. Is it now lawful for NPTA members to negotiate such discounts with a willing airline?

   Absolutely. The CAB expressly conferred that right in 1981 by REGULATION ER-1246.

5. Will H.R. 2053/S.764 interfere in any way with that right to negotiate?

   Absolutely not. The Administrative Law Judge's decision, which would be restored by these bills, would have no effect whatsoever on the right of NPTA's members to negotiate discounts directly with individual airlines.

6. Do NPTA's members want to be travel agents?

   No. NPTA's President testified that: "I don't think any of us really want to become travel agencies. We kind of like being BTD's and being employed by our company and having one loyalty." (Vol. 21, p.98 of Competitive Marketing Case transcript, February 17, 1981.)

The Law Judge said:

> "BTD's are not travel agents, and no change in the agency agreements could make them travel agents, without violence to any intelligible understanding of the terms "travel agent" and "agent." [Initial Decision at 56]

7. Why then does NPTA object to H.R. 2053/S.764?

Two reasons:

(1) Existing CAB decision enables them to negotiate to be so-called "on-line agents" for airlines - this permits them to ask for "commissions" (a percent of ticket price) as opposed to "discounts" (a percent of ticket price)!

(2) If CAB decision stands, airlines conferences will have to allow BTD's to become fully accredited travel agents after 1984 - they think this will give them greater leverage in extracting commissions from the airlines. While opposing enactment of H.R.2053/S.764, NPTA is arguing to the CAB that all antitrust immunity, and other key features of the conference accreditation system, should be disapproved immediately so that BTD's can force their way into the agency programs. NPTA has threatened to sue the airlines if they refuse to pay them after antitrust immunity is ended.

There is perhaps a third reason:

> Weakening the travel agency distribution system embodied in the conference programs will raise agents' costs and improve the bargaining leverage of BTD's.

Note: NPTA's position has changed constantly: In 1980 it told the CAB:

> "NPTA supports in principle abolition of the ATC structure." [NPTA Trial Brief, September 1980]

But in 1981 NPTA told the CAB:

> "We ask not a mandate from the Board but for removal of restraints against BTD payment. We realize, ultimately, that the free market will determine the nature of such payments, when they are implemented, and which carriers will offer such arrangements...we are willing to take our chances in the free market. [NPTA Brief on pricing issues, June 1981]

In February, 1983, a year and a half after the Board gave NPTA the market freedom it asked for, NPTA urged the Board to force the airlines to compensate them:

> "[The Board's decision] is based on the entirely fallacious assumption that the play of market forces will...introduce competition into the system." [NPTA Petition for Reconsideration of CAB final decision]

8. Why do most airlines refuse to pay NPTA members for their self-ticketing services?

    (1) Business travel is the high-yield segment of airline traffic - it is nondiscretionary travel which one former CAB economist has said should pay more, rather than less, than other travellers.

    (2) Self-ticketing corporations normally get much more time to pay the airlines than travel agents get (agents pay the week after a ticket is written - NPTA members get 30, 60 even 90 days credit); this is already a significant "discount".

    (3) Compensation of self-ticketing corporations would cost the airlines millions of dollars (unrebutted study by economist Robert R. Nathan for ASTA) - if yields from this business go down, the lost revenue must be recouped from discretionary traffic which is most sensitive to price increases.

    (4) Massive diversion of agency sales to corporations, as predicted by NPTA, would lead to increases in agency commissions for the remaining business handled by travel agents or to contraction of the agency distribution system (thus shifting additional costs to the airlines).

STATEMENT OF CORNISH F. HITCHCOCK, LEGAL DIRECTOR, AVIATION CONSUMER ACTION PROJECT

AIR TRAVELERS SECURITY ACT OF 1983

Mr. Chairman, Members of the Subcommittee: On behalf of the Aviation Consumer Action Project, I appreciate the invitation to testify today on H.R. 2053, the Air Travelers Security Act of 1983.

ACAP is the only non-profit consumer organization working full-time on aviation issues. It is supported entirely by contributions from the public. Since its founding in 1971, ACAP has initiated and participated in numerous proceedings of concern to the traveling public before the Civil Aeronautics Board, the Federal Aviation Administration and other federal agencies. It has testified at the invitation of congressional committees on legislation affecting air travelers and was an active supporter of the Airline Deregulation Act of 1978. In addition, ACAP has published a number of studies and reports and has provided assistance and advice to tens of thousands of individual consumers over the past 12 years.

H.R. 2053 is touted by its supporters as pro-consumer. It is not. Instead of serving the broad interest of the traveling public, it will only serve the narrow interest of travel agents, by giving them a permanent legal monopoly on selling tickets to the public for a commission, as well as an exemption from the antitrust laws. Such a result would limit competition and consumer choice. It would also stifle innovation by setting the current ticket distribution system in legislative concrete, regardless of how public needs may change in the future.

These comments should not be construed as somehow "antitravel agent." There are many skilled, dedicated travel agents who give their customers the best service they can every day. We are confident that these agents will be able to adjust to any changing circumstances and will continue to do a good job for the public.

Our concern is more fundamental. The airline industry is in transition. What worked yesterday and what works today may not work tomorrow. As a result, Congress should not be passing a law which, in effect, specifies that travel agents are the only outlet through which airlines can sell tickets. As the industry continues developing in a deregulated environment, as new technologies and alternative distribution systems emerge, airlines should have the flexibility to serve the public in different ways than the traditional travel agent system if they choose to do so.

Since H.R. 2053 is designed to overturn the CAB decision in the Competitive Marketing Investigation, issued in December 1982, a word about that decision would help put our comments in perspective.

The Comptitive Marketing Investigation was a three-year examination of the present travel agency network, which was designed to determine if the present framework of regulation and antitrust immunity would best serve the public in light of the changes under deregulation. Under the present regulatory system, all major airlines belong to conferences which jointly license travel agents and handle such technical matters as splitting fares among airlines, ticket stock security and so forth.

In order to become a travel agent under this system—and thus be eligible to sell tickets on all airlines which belong to the conferences—an applicant must meet certain "accreditation" standards which are designed to assure that agents are competent, honest and financially stable. In its decision, the CAB approved the current accreditation system, which does help protect the public from dishonest or incompetent agents, and there is a good argument that such a common licensing system does not require antitrust immunity because it is perfectly legal, so long as it is not administered by the participating airlines in a discriminatory or anti-competitive manner.

Conference agreements also contain so-called "exclusivity" clauses which require member airlines to sell their tickets exclusively through travel agents. Here is where the controversy lies. For many years, the CAB immunized these agreements from the antitrust laws. In the *Competitive Marketing* decision, the CAB reviewed 40,000 pages of testimony and exhibits and decided to phase out antitrust immunity for exclusivity on the ground that it is not needed to assure a high level of service to the public and that airlines and travel agents should be required to compete under the antitrust laws, as do non-regulated industries. In order to assure an orderly transition, the Board removed antitrust immunity, effective immediately, from exclusivity agreements concerning the sale of "on-line" tickets which an airline sells for its own flights, such as a Washington-Atlanta flight on Delta. The Board also voted to end immunity on 31 December 1984 for "joint-line" or "interline" tickets (e.g., a ticket between Pittsburgh and Atlanta, with the Pittsburgh-Washington leg on US Air and the Washington-Atlanta leg on Eastern).

H.R. 2053 is designed to overturn this decision and to preserve the travel agents' current monopoly on selling tickets for the airlines. Such a result could deny the traveling public important benefits which may be available if airlines were free to experiment with alternative distribution systems.

One potential benefit is convenience, for example, if people can buy tickets at retail outlets where they normally shop. These days, you can "buy your stocks where you buy your socks" at Sears, Roebuck, and legal clinics are opening their doors at large drug stores. If that is the case, and that is what the public apparently wants, then why should Congress be passing a law which would, in effect, make it illegal for people to buy airline tickets at these outlets? It is possible that airlines may choose in the future to market their tickets through a range of outlets, including retail-store chairs, banks and other financial services companies, not to mention the possibility of consumers using two-way personal computers tied to cable television systems. H.R. 2053 would outlaw such possibilities, and travel agents could rest easy with their legalized monopoly, knowing that a Montgomery Ward or some other new comnpetitor will not try to undercut their commissions or expand into their territory.

This is the real vice of the bill. There is a famous antitrust case in which the court observed that what monopolists really desire is "the quiet life," and that is precisely what H.R. 2053 would give to this industry. Agents would know that they will not have to worry about competition from unexpected sources, innovations they cannot control and other unpleasant surprises which could lead to someone taking away their business. Such a result may please the industry, but it does not really help the public.

A second benefit which could be denied to the public under this bill is price competition. Agent commissions account for ten percent of the price of a ticket, which is several points above pre-deregulation levels. If new outlets emerge, they may have lower costs and be able to pass those savings onto the public in the form of lower fares. Such alternative outlets may also be willing to accept lower commissions, which could also keep fares in line. I would note that the CAB "deregulated" prices in this area when it abolished fixed commissions serveral years ago, to let commissions seek their own level in the marketplace. If the marketplace is going to work, however, it is also necessary to relax the entry barriers, as the CAB voted to do.

Allowing the CAB decision to take effect could produce results analogous to what happened after the Securities and Exchange Commission abolished fixed commissions for stockbrokers in 1975. People who simply wanted to place a specific stock could pay a lower commission by going to a discount broker than if they ordered through, say, Merrill Lynch, whose rates were higher because it includes investment advice and other services. Differently stated, the reform meant that customers paid commissions according to the levels of service they wanted, and commissions moved more in line with the cost of providing such services.

There is an important point to be made about the CAB decision. It does not require anybody to do anything. It does not require an airline to deal with Ticketron or Montgomery Ward or anybody else to sell its tickets. All it does is create the option for airlines to use such a system if they decide they want to. We do not know if or when particular airlines will move to an alternative distribution system, but it would be a mistake for Congress to legislate that such flexibility is illegal and that the status quo must be preserved until some unspecified time in the future.

In mounting the offensive against the possibility of new competition, travel agents have argued that the CAB's decision would create "chaos" and make it difficult, if not impossible, for people to buy tickets with the same convenience they enjoy today. Let me make several observations.

First, the CAB decision affecting the sale of "on-line" tickets has been in effect for ten months, and no one has identified any "chaos" stemming from this event.

Second, such "chaos" arguments have been advance over the past decade by other industries faced with proposals to increase competition and antitrust scrutiny. If there is one thing that experience has shown, though, it is that such "chaos" arguments are usually overstated. For instance, when travel agents testified during the Subcommittee's "CAB early sunset" hearings in 1981, they said that the public would be subjected to numerous problems if the CAB no longer collected airline tariffs after 1 January 1983, as mandated by the Airline Deregulation Act. There were dire predictions about difficulties developing interline fares, loss of universal interchangeability of tickets, difficulty obtaining refunds, customer confusion and other inconveniences—the same sorts of arguments being advanced regarding H.R. 2053. However, tariff filing did end on schedule, and none of these horribles resulted. In fact, one travel agent association spokesman was quoted in the 3 January 1983 edition of Travel Management Daily as saying, "We have told agents that we don't foresee any major changes" now that tariff filing had ended. So much for "chaos."

Third, there are practical reasons why any changes implemented under the CAB decision are likely to be gradual and not disruptive. Airlines presently rely on travel agents to sell 60 percent of their domestic and 80 percent of their international tickets, and thus agents have tremendous economic clout. This was shown a few years back when United tried to lower agents' commissions for some tickets, only to have agents retaliate by booking customers on United's competitors. If an individual airline tried to make a deal with Ticketron or Montgomery Ward, for example, one might expect a similar reaction, at least for the short term. The presence of such raw power points up the need for potential new entry and competition, to reduce the possibility that consumers will find themselves booked on a less convenient flight because they are unwittingly caught in the middle of an airline-agent feud over commission levels.

Finally, and perhaps most importantly, experience indicates that when change does occur despite industry predictions of "chaos," the public usually benefits, and I have previously outlined the convenience and price competition benefits which the CAB decision could produce. Conversely, if innovations are tried, and the public is not interested or prefers doing business under the former system, then nothing is lost. What is assured, however, is that public demands are being met through the forces of competition and that there is the flexibility to respond to changes in consumer demand in the future.

An apt analogy was offered by Assistant Attorney General William F. Baxter during testimony on this bill before the Senate Aviation Subcommittee. Nearly a decade ago banks proposed experimenting with automated teller machines, as a means of facilitating personal banking. Some in the industry opposed such innovation, arguing that such a move would be disruptive and cause customer confusion. Yet banks began installing such machines, and many consumers do prefer the convenience of such systems.

The point I am making is that Congress should not be attempting to freeze the status quo and deny the public the possibilities of new options for purchasing tickets if airlines choose to experiment with such methods. What Congress should do is allow the CAB decision to take effect and to hold an oversight hearing two or three years down the road to see how the system is working. Enacting legislation to restrict price competition and future innovations could only work to the detriment of the travelling public. Thank you.

Mr. Mineta. Please proceed.

TESTIMONY OF JONATHAN S. LINEN, PRESIDENT, TRAVEL DIVISION, AMERICAN EXPRESS TRAVEL RELATED SERVICE CO., INC., AND CORNISH F. HITCHCOCK, LEGAL DIRECTOR, AVIATION CONSUMER ACTION PROJECT

Mr. Linen. Good morning, Mr. Chairman.

Mr. Mineta. First, we would like to hear from Mr. Hitchcock of the Aviation Consumer Action Project. We are particularly interested in your testimony, Mr. Hitchcock, because every witness in these hearings claims to merely have the best interests of the consumer at heart. I am sure you are pleased to be at such congenial hearings where everybody is proconsumer, however you are the only witness who has come forward who represents an organization whose sole purpose is advocacy of the consumer's interest you have done so for many years.

So, Mr. Hitchcock, if you would go ahead and proceed in your own fashion.

Mr. Hitchcock. Thank you very much, Mr. Chairman, for that introduction. It has been a while since I have appeared before this subcommittee. It is a pleasure to be back with you this morning. The bill you are considering is praised by its supporters as being proconsumer. In our view it is not. Instead of serving the broad interest of the traveling public, it will only serve the narrow interest of travel agents, by giving them a permanent legal monopoly on selling tickets to the public for a commission, as well as an exemption from the antitrust laws. Such a result would limit competition and consumer choice. It would also stifle innovation by setting the current ticket distribution system in legislative concrete, regardless of how public needs may change in the future.

These comments should not be construed as somehow antitravel agent. There are many skilled, dedicated travel agents who give their customers the best service they can every day. We are confident that these agents will be able to adjust to any changing circumstances and will continue to do a good job for the public.

Our concern is more fundamental. The airline industry is in transition. What worked yesterday and what works today may not work tomorrow.

As a result, Congress should not be passing a law which, in effect, specifies that travel agents are the only outlet through which airlines can sell tickets. As the industry continues developing in a deregulated environment, as new technologies and alternative distribution systems emerge, airlines should have the flexibility to serve the public in different ways than the traditional travel agent system if they choose to do so.

Since H.R. 2053 is designed to overturn the CAB decision in the competitive marketing investigation, issued in December 1982, a word about that decision would help put our comments in perspective.

The competitive marketing investigation was a 3-year examination of the present travel agency network, which was designed to determine if the present framework of regulation and antitrust immunity would best serve the public in light of the changes under deregulation. Under the present regulatory system, all major airlines belong to conferences which jointly license travel agents and handle such technical matters as splitting fares among airlines, ticket stock security, and so forth.

In order to become a travel agent under this system—and thus be eligible to sell tickets on all airlines which belong to the conferences—an applicant must meet certain accreditation standards which are designed to assure that agents are competent, honest, and financially stable. In its decision, the CAB approved the current accreditation system, which does help protect the public from dishonest or incompetent agents, and there is a good argument that such a common licensing system does not require antitrust immunity because it is perfectly legal, so long as it is not administered by the participating airlines in a discriminatory or anticompetitive manner.

Conference agreements also contain so-called exclusivity clauses which require member airlines to sell their tickets exclusively through travel agents. Here is where the controversy lies. For many years, the CAB immunized these agreements from the antitrust laws. In the competitive marketing decision, the CAB reviewed 40,000 pages of testimony and exhibits and decided to phase out antitrust immunity for exclusivity on the ground that it is not needed to assure a high level of service to the public and that airlines and travel agents should be required to compete under the antitrust laws, as do nonregulated industries.

In order to assure an orderly transition, the Board removed antitrust immunity, effective immediately, from exclusivity agreements concerning the sale of online tickets which an airline sells for its own flights, such as a Washington-Atlanta leg on Eastern.

H.R. 2053 is designed to overturn this decision and to preserve the travel agents' current monopoly on selling tickets for the airlines. Such a result could deny the traveling public important benefits which may be available if airlines were free to experiment with alternative distribution systems.

One potential benefit is convenience, for example, if people can buy tickets at retail outlets where they normally shop. These days you can, as the saying goes, "buy your stocks where you buy your socks" at Sears Roebuck. I have even noticed some lawyers are opening offices in large drugstores. If that is what is happening and what the public apparently wants, it is hard to see why Congress should be passing a law to say that selling airline tickets is somehow different, that Congress has to pass a law to limit the types of outlets. In the future, airlines may choose to expand their marketing efforts to deal through other outlets, and that should not be denied the public.

The real problem with the bill by giving the industry a legalized monopoly is it gives them what one court referred to as the "quiet life," which is the real goal of monopolists. Agents would not have to worry about some petition from unexpected sources, innovations they cannot control and other unpleasant surprises which could lead to someone taking away their business. Such a result may please the industry, but it does not really help the public.

A second benefit which could be denied to the public under this bill is price competition. Agent commissions account for 10 percent of the price of a ticket, which is several points above prederegulation levels. If new outlets emerge, they may have lower costs and be able to pass those savings on to the public in the form of lower fares. Such alternative outlets may also be willing to accept lower commissions, which could also keep fares in line.

I would note that the CAB deregulated prices in this area when it abolished fixed commissions several years ago, to let commissions seek their own level in the marketplace. If the marketplace is going to work, however, it is also necessary to relax the entry barriers, as the CAB voted to do.

Allowing the CAB decision to take effect could produce results analogous to what happened after the Securities and Exchange Commission abolished fixed commissions for stockbrokers in 1975. People who simply wanted to place a specific stock could pay a lower commission by going to a discount broker than if they ordered through, say, Merrill Lynch, whose rates were higher because it includes investment advice and other services. Differently stated, the reform meant that customers paid commissions according to the levels of service they wanted, and commissions moved more in line with the cost of providing such services.

The analogy that I draw here is one similar to that drawn by Congressman Levitas. He mentioned full service gas stations and so forth. It was a form of deregulation, if you will, a number of years back when the Securities and Exchange Commission did away with fixed commissions for stockbrokers, and what you saw was a diversification of services. If people want investment advice, they pay for that. If all they want to do is call up and pay for a stock, they can do that, too.

I want to make one point about the CAB decision, and that is that it doesn't really require anybody to do anything. It doesn't force an airline to deal with Ticketron or Montgomery Ward or anybody else if it doesn't want to. What it does is create the option for better service in the future if that is what the public wants and if airlines want to experiment.

In dealing with this bill there have been a number of arguments about the decision leading to chaos I would respectfully disagree with Mr. Packard in that if we were going to see such problems, we would have seen them by now.

Similar arguments were, made 2 years ago, with respect to the issue of doing away with tariff filing at the CAB. I reread the testimony before the subcommittee, and there were predictions from travel agents that if the CAB no longer collected tariffs, there would be no interline fares, loss of universal interchangeability of tickets, difficulties obtaining refunds, customer confusion, other inconveniences, precisely the same arguments we are hearing today.

But as it turned out tariff filing did end on schedule and no one has identified any chaos that happened as a result, and in fact one of the travel agents' spokesmen told a trade publication that there wouldn't be any major changes once the reform took effect.

Another point I would like to make: I doubt there would be any serious disruption soon given the present power of the travel agents in the industry. If there are going to be any changes, they are going to be gradual. You have heard testimony about agents plating away from particular carriers when they try to lower commissions or something like that. That says two things.

First of all, you are going to see only a gradual change. Second, the presence of that kind of power suggests the need for potential competition. As a customer, I don't want to be booked on a less convenient TWA flight because the agent is having a problem with United. If I want the most convenient flight, I want to be served in that fashion.

Finally, the most important response I think to the chaos argument is that when these arguments were raised in the past against other reforms, the public usually benefited. I have mentioned the convenience and price competition benefits. There is one apt analogy offered during testimony on the other side of the Capitol by Assistant Attorney General Baxter that I think is instructive. He talked about how a decade ago the banking industry started trying to innovate with automated teller machines. There were arguments made that they would be too confusing, the public wouldn't like it. I was living in Chicago at the time, and regulators were running around trying to enjoin banks from putting these up and seizing machines and that sort of thing. We were told it was needed for consumer protection, that the public had to be protected. As it turned out, banks started installing these machines and some members of the public seem to like that service.

The point I am making is that that Congress should be doing is giving the public a chance to see what it wants and what it doesn't want. It is difficult to predict at this point what the public will want because there has only been one item, in effect.

What Congress should not be doing is freezing the status quo regardless of what changes occur in the future. What Congress should be doing we would submit is allowing the CAB decision to take efect and coming back in a year or two to see how the system is working.

I will conclude my remarks at that point. Thank you very much.

Mr. MINETA. Thank you very much.

Mr. Linen, you come as president of the Travel Division and you are probably as well known as anybody in this whole business. We are pleased to have you here.

Mr. LINEN. Thank you, Mr. Chairman. I am particularly pleased to be here to express American Express' opinions on this bill this morning. I will try to be brief and to the point.

As one of the oldest members of the travel and tourism industry, we have actively supported all major pieces of legislation that have promoted ease, economy, and efficiency in travel, for the United States and throughout the world. We believe, however, that H.R. 2053 serves neither the interests of the traveling public nor of the travel industry itself.

As you well know, the industry is going through dramatic changes. Air carriers are now free to add or drop virtually any domestic route; to price their services at whatever level they wish; and, more recently, to market their services through whatever distribution channels they may desire.

All these changes came about because of the Airline Deregulation Act of 1978. Through this act, Congress mandated that the Civil Aeronautics Board place maximum reliance on competitive forces to foster innovation, efficiency, and low prices in air transportation.

The results speak for themselves. There have been some bad effects to be sure—such as airline bankruptcies, interruption of service to certain communities, and confusingly complex fares. But, for the most part, deregulation has worked well, and the traveling public and industry have benefited from it.

I believe this creative competition should continue to be encouraged throughout the industry. In particular, I believe we should employ the dynamics of a free marketplace to structure the distribution system for air transport services.

By our reckoning, potential exists for tourism to move from the Nation's second largest retail industry to the Nation's largest. We think the industry has enough sophistication, ingenuity, and technological capacity to persuade Americans and others to spend much more of their disposable income on travel and tourism. That is why American Express opposes H.R. 2053. The bill would preserve restrictive rules that stifle innovation—that discourage the use of new technologies for greater customer savings and convenience.

This morning, I will discuss what we at American Express believe the travel industry's objectives should be regarding the public interest.

But first, I think it helpful to set the stage by offering some background on American Express and on the history of travel deregulation.

American Express Co. and its subsidiaries are primarily engaged in providing a variety of travel related, insurance, international banking, and investment services.

The Travel Division is one of the most visible of our businesses. Retail travel services, for personal and business purposes, are offered through a network of company-owned and representative offices worldwide. This network, which includes 130 offices in the United States, offers trip planning, reservations, airline ticketing, and package tours amongst other travel services.

American Express has more travel offices than most firms in the business, and some think that the defeat of H.R. 2053 would benefit only us and other large agents. That is simply not true. In the travel business, competitive advantage is gained not by size but by quality of service—in particular, by service that fits the needs of localized markets.

Let me emphasize: Travel agencies, including our own, provide services to individual and corporate clients in local areas, and due to this market fragmentation, larger agencies cannot count on gaining advantage from economies of scale. Furthermore, since American Express offices compete with other local travel agencies head to head, we are affected by regulatory constraints in much the same way as travel agencies with only one or two offices.

Even if overall size were a material factor, American Express operates only 130 offices of the more than 20,000 ATC-approved agencies that now exist, and last year, our sales represented less than 3 percent of total travel agency sales.

This brings us to the Airline Deregulation Act of 1978, which completely overhauled the statutory guidelines that had governed most aspects of our industry for over 40 years. As you well know, the drafting and passage of this historic act required 2½ years of dedicated legislative effort.

This act gave the Civil Aeronautics Board a new declaration of policy for domestic air transportation. In contrast to the prior policy, the CAB was given a clear and firm mandate to rely primarily on competition, rather than strict regulation, in overseeing the industry—thereby promoting an efficient, low-cost air transportation system.

To carry out its mandate, Congress gave the CAB the flexibility to act in the public interest, without being handcuffed in every circumstance to each specific provision of the legislation. It also reduced the CAB's authority to grant approval of—or confer antitrust immunity on—air carrier agreements; this was to insure that air transportation would be subject to the same antitrust law standards and competitive forces as other industries.

Acting on its mandate, the CAB undertook 4 years ago to reexamine its approval and grant of antitrust immunity to the airline agreements that govern travel agents. American Express recognized the importance of this action and took an active part in the CAB's study, known formally as the competitive marketing investigation—docket 36595.

Briefly, our position was this: We opposed the CAB's approval of, or the extension of antitrust immunity to, any airline agreement that reduced competition between the carriers themselves, between carriers and agents, or between agents.

Why did we oppose approval of the airline agreements? We voiced opposition because the agreements permit the airlines, acting collectively, to restrict agents' freedom to compete with airlines or anyone else who might wish to provide travel services to the public. In addition, these collective agreements inhibit innovation by travel agents and therefore deprive the public of the benefits of new technology. Simply put, we want travel agents to have the freedom to compete on an equal basis.

Here are a few examples of the type of anticompetitive agreements which we opposed:

One, agreements that prevented a travel agent from installing ticketing machines on the premises of a customer or on the premises of a company owned, controlled by or affiliated with the agent;

Two, agreements that imposed on headquarters and branch office managers of travel agents mandatory and inflexible experience requirements;

Three, agreements that prohibited agents from opening offices at airports; and

Four, agreements that barred an agent from earning commission on airline ticket sales to its employees or the employees of its affiliated companies for the purpose of business travel.

The competitive marketing decision that was finally rendered by the CAB in December 1982 faithfully executes the legislative mandate of the Airline Deregulation Act—because it embodies the belief that the distribution system for air travel should be determined by the marketplace. As a result, airlines will be able to make individual marketing decisions that are responsive to consumer demands. Both airlines and travel agents will be free to develop more innovative ways of distributing tickets to the public, for greater efficiency and lower costs. Clearly, the public will benefit from such innovation, since material improvements in customer service are already possible through advanced computer hardware and software.

Some, Mr. Chairman, have disagreed with the CAB's decision; hence, they also dispute the congressional mandate that equates the public interest with industry competition. Through the auspices of H.R 2053, these parties propose a return to the protectionist policies the bill before you would direct the CAB to reverse its landmark decision. It would give protectionism new life by granting indefinite antitrust immunity to virtually every air carrier agreement governing the agency program.

Supporters of H.R. 2053 say the antitrust immunity that protected the industry in its infancy is still necessary. Without it they claim the agency program would surely die. Such doom-saying seems extreme when one considers that there are airline agreements that have never had immunity while others recently had their immunity removed. Yet all still continue to function.

For example, the agreement on the airline clearinghouse for ticket sales by airlines has never had antitrust immunity. The agreement on the universal air travel plan recently lost its immunity. Yet both agreements are alive and well and, to the best of my knowledge, have not been a source of problems for the airlines. The history of U.S. economic growth has shown, and recent congressional action has recognized, that the free marketplace is the best guarantor of innovation, efficiency and improved service for the public.

I know your decision will turn ultimately on what is best for the traveling public. My sense of the travel industry is that most forward-thinking professionals accept the free market as a force for the public good. As something that will help both their own interests and those of their clients. We at American Express believe the long-term benefits which can be obtained by increased competition present the strongest arguments against H.R. 2053.

I urge that you reject this legislation, and let the marketplace have the final say, both on the destiny of our industry and on what is best for the American public.

Mr. MINETA. Thank you very much, Mr. Linen.

One of the main arguments that has been raised against the CAB's decision is that phrase we have heard in the past, "If it ain't broke, don't fix it." Now it is argued that CAB has been unable to point to any way in which the current ATC agreement prevents innovations which would help consumers. However, the testimony presented by this panel suggests that a number of the current ATC rules on how an agent does business are preventing desirable innovations. I am wondering if you could elaborate on what these rules are and what innovations are being in fact prevented.

Mr. LINEN. Mr. Chairman, as simply as I can put it, the airline industry is being deregulated. Yet, probably its most significant distribution arm, the travel agent community, is being prohibited by, or would be prohibited under this bill by the maintenance of some marketing restrictions which would place us on an unequal footing with the airlines in terms of our capability to distribute to the public in different ways airline tickets.

For example, if this bill were enacted, it would prohibit travel agents from placing ticketing machines on the premises of its commercial accounts, while the airlines would continue to be able to do so. It would prohibit us from appointing managers who did not have certain types of educational background or experience in the industry. It would put us basically on an unequal footing with an airline who, while we serve our airlines and our carriers, filling their seats with our customers, we are also, let's face it, in competition with them to some degree in terms of filling those seats.

Mr. MINETA. Let me stop you at that point and ask about this point you just made about how you would be restricted in the type of travel agent you could be, or person you would be able to have out there who would have to have certain educational requirements. Isn't that there to protect the public, to make sure that we have people of competence who are dealing with the industry, and the customer?

Mr. LINEN. Absolutely. And I agree that there should be certain standards of professionalism for anybody who is going to go in the travel business. American Express is cognizant of the need to provide the kind of service that will make a customer want to come back through the door instead of go somewhere else. We have to decide ourselves what kind of standards are applicable to be able to provide the best kind of service and that is a freedom we would like to have in the marketplace, and that the customer, consumer, ultimately will decide whether we are professional enough to provide the kind of service we would like versus somebody else.

I would agree on the lowest common denominator it would be nice to have some kind of standard for the industry.

Mr. MINETA. Mr. Hitchcock.

Mr. HITCHCOCK. Well, I am not sure I have much to add. As I recall Judge Yoder's decision, there was discussion about Ticketron and how technically Ticketron didn't qualify under some of the various agreement standards, but Judge Yoder thought that they should be permitted in. The argument that I hear from the travel agent industry about other outlets getting in is "they just don't want to meet our standards," which I think begs the question, which is whether or not the standards we have been talking about are too restrictive. Why do you have to have the restrictions such as Mr. Linen talked about that limit marketing, when some of the other outlets mentioned might be more willing to get into the business if some of these restrictions were removed.

Mr. MINETA. Mr. Hammerschmidt?

Mr. HAMMERSCHMIDT. Thank you, Mr. Chairman.

Let me direct this question to you, Mr. Hitchcock, and then if Mr. Linen wants to respond, why, we would appreciate that as well.

One of the justifications being mentioned in support of preserving antitrust immunity is that immunity is necessary to protect the airlines and agents from frivolous lawsuits that cost a lot of money to defend. In your opinion, should this be an important factor in our consideration of the immunity issue?

Mr. HITCHCOCK. Let me respond to that question in several ways, Congressman. In the first place, as Judge Yoder pointed out in his decision, there are already frivolous lawsuits that are filed. In fact, he named several in the opinion.

Second, the question came up in testimony before the other side, as to what would these lawsuits claim. If a travel agent goes out of business, what is the nature of the antitrust violation or the other violation that they are going to charge against the Air Traffic Conference or whomever? I am not sure there was ever really a good answer to that question.

Third, I think that if you have a situation where the licensing system is done in an equitable and nondiscriminatory fashion, you are not going to have an antitrust problem or antitrust violations. If a travel agent does want to sue, there probably are going to be a few of these suits, but after a couple of decisions, I think the law would be fairly clear, and anybody who wanted to file suits afterward is going to have an uphill battle.

Fourth, you have the problem if somebody does file this lawsuit, if they are bankrupt and bring a complaint against the conference or whomever, they have to find a lawyer who is willing to do it and face the risks that they are going to have to pay for the costs of the defendants if they lose. That could provide a considerable disincentive.

If there is a problem of frivolous lawsuits, which I don't think is likely to be particularly severe here, I think it is probably best dealt with on a generic basis, perhaps by the Judiciary Committee or changes in the Federal rules to deal with that situation. We have heard it in other industries across the board, people say there are too many lawsuits, too many lawyers. I don't think the problem, if there is any, is confined to this area.

Mr. HAMMERSCHMIDT. Thank you.

Mr. Linen, do you want to comment?

Mr. LINEN. I would only add that as a representative of the Department of Justice on the other side, Mr. Baxter did testify that doing away with antitrust immunity for things like the interlining of tickets and baggage, an area settlement bank would in his opinion not be viewed as anything other than a standard industry agreement and therefore not likely to be subject to any kind of antitrust effort.

Mr. HAMMERSCHMIDT. Well, let me pursue that a little further. The travel agent associations have said that the system of common accreditation of travel agents authorized in the ATC and IATA agreements would be in jeopardy if antitrust immunity was no longer provided. Although the CAB specifically approved common accreditation and believes it could survive without immunity, what would your reaction be to continued antitrust immunity of these agreements without the exclusivity provisions?

Mr. Hitchcock?

Mr. HITCHCOCK. Thank you. The issue is raised in a number of contexts. There are a number of associations, others who do engage in licensing and standards settings, various professional groups, who do so without a grant of antitrust immunity. What the Supreme Court indicated in the *Hydrolevel* case a couple terms back, I think, is that you can have that kind of common association or firm that deals on an industrywide basis. It doesn't need antitrust immunity. Its conclusions are legal and subject to the antitrust laws. The vice that antitrust law tries to attack is when members use the organization to act in an anticompetitive fashion. I think that is really what Congress should be focusing on. The system works well when people are not using it in a manner that is discriminatory or anticompetitive. That is the benefit you have from having the exposure to antitrust law to catch that rare instance when somebody might attempt to use it to block somebody in an anticompetitive manner.

Mr. HAMMERSCHMIDT. Thank you.

Mr. Linen, do you want to comment on that further?

Mr. LINEN. Yes, I just would only add that I believe or we believe that the collective ability of an airline community to appoint ATC or IATA appointed agency is not necessary for the proliferation of some kind of appointment system. That indeed, any airline ought to have the capability to decide for themselves what kind of agent they would like to be selling their tickets.

Mr. HAMMERSCHMIDT. Mr. Linen, let me direct this question to you, please. During an earlier session of these hearings, the CAB and other agencies mentioned a rather lengthy list of business practices which would not be permitted if this bill were adopted. Some of the practices mentioned included an agency that wanted to be open only on weekends or nights, an agency that wanted to sell only over the telephone, sales through home and business computers, or the sale of tickets at a temporary site such as at a convention.

On page 5 of your testimony, you also mention some other provisions of the Air Traffic Conference agreements which you believe inhibit competition. However, ASTA has stated that "No one who could enter the ticket distribution market under the Board's decision would be foreclosed from entering by the judge's approach." I wonder if you would want to expand on your testimony in light of this apparent contradiction.

Mr. LINEN. It is our belief that under this bill, which espouses the Yoder decision basically, we would as an agency be prohibited from doing some of the kinds of innovative things you just mentioned, Congressman, like placing ticketing machines on the premises of commercial accounts that we serve, or in department stores or wherever we might like to. Or in fact, in going into the distribution of tickets through the cable mechanisms or other kinds of innovative things that technology is allowing other industries to begin to participate in today.

While it is true that a Ticketron under the Yoder decision could issue tickets, for example, that is limited to a point-to-point kind of ticket, probably mostly issued through a machine. And that the right of Ticketron to engage in the counseling of air travel customers does not exist. It is just a point-to-point mechanical delivery of a ticket.

Mr. HAMMERSCHMIDT. Thank you.

Thank you, gentlemen, for your testimony and for your responses.

Thank you, Mr. Chairman.

Mr. MINETA. Mr. Levitas?

Mr. LEVITAS. Thank you, Mr. Chairman.

Mr. Linen, let me start by addressing this question to you, and the first aspect is a statement I will make which I don't ask you to agree or disagree with, but just accept it as something that I believe; that there is a very important role served in our economy by small businesses being able to compete fairly in the marketplace, and that in most instances such as the travel agency industry, that is a place where small business should play a role.

American Express obviously is not a small business, and would very likely be able to compete under the circumstances where the exclusivity provisions were not provided. But what effect do you think it would have on the smaller businesses in this field, and are you really advocating something that, while you may believe it is good for the consumer, would be really also very good for American Express, given its large, dominant position in the industry?

Mr. LINEN. Congressman Levitas, thank you for the question. I believe what you are asking is, I think, is American Express so large that it is not going to be affected, and if this legislation were not enacted, that the small businessman of which there are many in the 20,000-plus travel agents in existence today, would be in jeopardy. American Express, as I indicated in my comments, has about 130 offices out of 20,000 plus that doesn't seem like a lot. The important thing to consider here which we believe strongly is that we don't compete on a national basis. People don't come to us because we are a national network. They come to us because we have an office in an individual marketplace.

We compete in those markets often against competitors who are small businessmen or women who own travel agencies who have been established in those communities for years and years, and they are damn good competitors. I do not think anybody who provides a service to a customer in a local community or in a large city, if that service is a good, quality value, and the customer perceives it as such, will go out of business under any kind of marketplace conditions.

Mr. LEVITAS. The question of competition, some of the travel agents have argued that there is plenty of competition, and entry really is not restricted.

Mr. Hitchcock, you made the point about entry. Not only are there some 20,000-plus agencies at the present time, but the number of new entrants on an annual basis, figures I have seen don't appear to indicate a great deal of difficulty in becoming certified as a travel agent.

Is the argument that this legislation would impair entry into this business a legitimate argument? Is it a real argument? Or is it just a verbal argument?

Mr. HITCHCOCK. Well, as you know, Congressman, in competitive analysis, there is actual entry and potential entry. What you are talking about is entry into a certain form of doing business the way travel agencies have always been operated. What we are really talking about in the discussion about entry barriers about different types of service, entry that might be blocked such as the examples that were given in the CAB testimony and Mr. Linen's testimony.

It may be that the public is personally content with the current system, and some of these new ventures may be tried and fall flat on their face. The important point is that there ought to be the potential for the experimentation and innovation to try to serve the public rather than saying, "Yes, there are a lot of people who are coming in the industry in the traditional way, so that means we can keep these kinds of marketing restrictions in effect."

If I could try an analogy which may not work, but I will try it anyway, the argument was made with respect to the legal profession a few years back, that there are a lot of lawyers coming in the field that we don't really need competition, that we ought to maintain what in effect are marketing restrictions such as prohibiting advertising. What you have seen by allowing competition here is new forms of service that have cropped up, such as legal clinics. By doing away with minimum fee schedules you also have more price competition.

The benefits have really been toward serving individuals a lower cost, legal clinics, and so forth. That is the sort of new type of service that you saw in one other service profession. I think that is what we are talking about with respect to entry barriers here.

Mr. ANDERSON. Will the gentleman yield on that?

Mr. LEVITAS. Be happy to yield.

Mr. ANDERSON. Yes, I keep hearing this talk about innovations that won't be allowed or couldn't get in. What we are talking about in the bill is to continue what we have been doing for the last four decades. Now it seems to me there have been lots of innovations developed. And what innovations have not been allowed to come in under our present setup?

Mr. **Hitchcock**. You have a situation, as you are aware, Congressman, where there were various restrictions that were put on that have been gradually whittled away. As I recall, I think until a number of years ago there were restrictions on how many travel agents could be within *x* square miles of each other in a metropolitan area. You still have the 20-percent rule. The innovations that I think we are talking about are some of the innovations that Mr. Linen mentioned, about temporary siting, putting facilities at commercial accounts, some of the others that were mentioned in the CAB testimony that Congressman Hammerschmidt discussed.

The other point is, by opening up entry, or creating the potential for entry by non-traditional travel agents, what you are really doing is providing a goad to the industry if someone wants to come along and experiment with these. If you have in a sense is a closed system, the agents have what is referred to in the testimony as "the quiet life." There aren't going to be any unpleasant surprises, there is not going to be efforts by airlines to try to come along and try to innovate through banks or something of that nature, just because of the rigidities that are in effect under the current system.

Mr. **Anderson**. Are you telling us we haven't had innovation the last four decades?

Mr. **Hitchcock**. No, sir.

Mr. **Anderson**. It seems to me one of our problems almost has been a tremendous amount of innovation in the travel agency business. And everything, all kinds of activities, and that this has been very progressive. Some of them have been held back when they don't work. I assume that is—what you say you want it seems to me is what we have had for the last four decades.

Mr. **Hitchcock**. The point I was making is that what worked yesterday and what is working today may not work tomorrow. What you are proposing to do with your bill, sir, is to pass a bill that in effect freezes the status quo.

Mr. **Anderson**. With all the innovations we have had, they will change just like they have in the past. There is nothing to stop innovation.

Mr. **Hitchcock**. It is a question——

Mr. **Anderson**. If there was, they would have stopped it 10, 20 years ago.

Mr. **Hitchcock**. I think the point about Ticketron again was made. There were problems getting Ticketron which was something to qualify under the ATC standards. That was an innovation I think that only World Airways experimented with. It didn't go to a larger scale. It is a question also, I think, of incentives. What incentives are there to assure innovation? Under the old system, there were the various restrictions that were put in place on how many agents to a community, if you will, or what percentage of your business can go to no more than one customer. Some of the innovation came as those started to be removed.

In effect, what we are talking about is seeing what others might come along and what other incentives there may be for nontraditional agent sources to get in and to offer services to the public.

Mr. ANDERSON. So we are just asking the same thing that we have had in the past that you apparently approve but now you fear what we have had in the past in the future.

I yield back.

Mr. LEVITAS. Let me just follow up on that.

Mr. Linen, would you like to offer some thoughts on what types of innovations would be permitted if the present system were not continued?

Mr. LINEN. Yes. Thank you, Mr. Levitas.

Can we please remember that, again, the travel agent community is the largest single source of distribution for airline tickets, approaching 70 percent. Also, that the airline industry, like it or not, is in the process of deregulation. What we would find ourselves in were this bill to be passed is a situation where the airline industry is totally deregulated and the travel agency industry is not totally deregulated in terms of what it can do. As a major distributor of airline tickets, I would like the right to be able to market and sell airline tickets on behalf of a carrier in the same context that that carrier has. Under this bill, I would be precluded from doing so, particularly with regard to what I keep repeating and as you have asked, the kinds of innovative things that would allow us to put devices or ticketing machines through technological change, an extension of delivery mechanisms.

Often more cost efficient to the home, even, for consumers who may want to purchase travel that way, or in other locations such as a physical bricks and mortar travel agency, airline commercial ticket office or airport. Right now I am precluded from doing that. I would just like the right to be able to do that.

Mr. LEVITAS. Let me turn to, I think, my next question, and that is the subject of the protection of the public. Agencies argue that by having this certificated system, the public is better served because there is a way of making sure that only reliable, dependable operators get into the business. Because they have special responsibilities, they will be in a better position to look after the public's interest in this regard.

My questions are these: First of all, in the event exclusivity were done away with, and the existing system abandoned, as the CAB would have us do, would it be possible, or has any thought been given to a requirement of State licensing, for example, of professionals in the travel industry so that you maintain some sort of control of responsibility over this industry as we do in other industries where the public has to rely upon the competence of the individuals involved? Or alternatively, is your response, maybe there is a third response, but alternatively, is your response, it is like people who wanted to earn interest on their money for a long period of time. They could either put it in a money market account with a stock broker and earn a higher return of interest without having the FDIC or some other Federal agency insure that account, or they could have put in for a lower rate of interest and now I suppose for the same rate of interest in an insured account with a bank or savings and loan association.

Mr. Hitchcock, do you want to try that for openers?

Mr. HITCHCOCK. Let me try if I can to break the answer down in a few pieces. The distinction is to be made, as you know, between accreditation and exclusivity. It is true that there are some standards for accreditation, for fitness, sort of a licensing test if you will, which does serve the public to make sure that you are dealing with honest, competent financially stable people, and you have those sorts of provisions now. As I recall the Board's opinion, those would continue.

The heart of the controversy is about exclusivity. I suspect you are going to have that accreditation system retained in one form or another so I think you do have some protection of the public there.

Second, the argument usually arises in the context of "unless Congress passes this bill, everybody and his brother is going to be able to sell airline tickets no matter what their qualifications are, and that is going to hurt the public." One answer to that is that I think the airlines are still concerned about who they market their tickets through and are not going to be necessarily selling at the corner grocery shop.

Coincidentally, just to put that in concrete, one of the judge's decisions is designed to let Ticketron into the market. The last time I was at a Ticketron location, it was located in a record store. So in effect, you would have that kind of situation where there would be greater breadth of opportunity even under H.R. 2053, where you have more people selling, and apparently the travel agent community is willing to accept that.

As far as State licensing, I am not really sure. I think that some States do have or have considered passing various State statutes to deal with the qualifications. I am just not sufficiently sure what the status of it is. I mean, conceivably if you have a problem there, you might want to consider some kind of national standard approach on that. But I am just not sufficiently familiar.

Maybe I should, if that answers your question, I should stop there and turn it over to Mr. Linen.

Mr. LEVITAS. That will do. I think that gives me the direction I wanted to move in.

Thank you very much.

Mr. MINETA. Will the gentleman yield.

Mr. LEVITAS. Be happy to.

Mr. MINETA. The question, going back to the previous question by Mr. Anderson which was, not so much that innovation is being curtailed as it is a number of people getting together and saying, "These are the kinds of innovations that we will allow to occur or not occur." It seems to me that when we talk about antitrust immunity and exclusivity, innovation has occurred and we want that innovation to occur but the question is: Should a group of people be able to get together and say, "These are the only ones that will occur," and should we allow that to be the way the industry operates.

Mr. HITCHCOCK. I think that is a very good statement. That is one of the problems with collective action, which has the cloak of antitrust immunity over it. It can be used in ways to limit competition in some of the particular resolutions that have been adopted. But, as I said in response to Congressman Anderson's question, it is often a question of incentives. What incentives do you give individuals to try to experiment rather than of sort of a collective body setting the general standards on some of these competitive issues.

Mr. **Levitas**. I think that is a very good point. And it is one that as Chairman Mineta brings to our attention, that it is not whether or not you have innovation, but who will make the decisions as to what innovation you will have. Will it be the airlines getting together and saying "We will permit this and not permit that"? Or should it be the entrepreneurs and marketplace who make that decision and ultimately the consumer?

The last question then in light of that, let's assume that a majority of the committee and the Congress finds some merit in the concept in this bill. One of the questions that I have is, should we put into law legislate, if you will, the specific actions of the administrative judge, law judge in this case? Or should we, if we think this is an appropriate direciton to move in, simply direct the agency involved, either this one or its successor, to permit the type of arrangement so that at least we maintain some sort of flexibility and can change this position someplace down the line without going through the entire legislative process?

Mr. **Hitchcock**. I think that is one of the drawbacks in the bill. One of the problems with Judge Yoder's opinion from a technical standpoint is it lets Ticketron under the tent, but I am not sure who else it lets in under the tent. It raises a number of questions, and the CAB or its successor and the committee are going to have to grapple with them for a considerable time over the years. I think that problem should preclude taking the bill as is. Then you get into the more difficult question of deciding who should be allowed in and who should not.

Those are some of the pitfalls you have because you are probably going to have to be constantly coming back with legislation. It is one of the problems with passing legislation in the area. You are not sure whether you are going to be able to keep ahead of technology or whether you are going to be cutting somebody out you may want to get into the industry, and you do it all through the legislative process.

Mr. **Levitas**. Thank you.

Mr. **Mineta**. Mr. Packard?

Mr. **Packard**. Thank you.

Mr. Linen, what precludes various organizations like yours under the procedures previous to the CAB decision to regulate, what——

Mr. **Linen**. I am sorry, Mr. Packard. What precluded us?

Mr. **Packard**. Why couldn't you have done all these innovative things and done it within the industry? What was there in the law that prevented you from doing that?

Mr. **Linen**. Under it then, before the CAB decision, an agency had to have an appointment, or location where it delivered tickets. Under the ATC rules, I was prohibited from putting a ticket distribution machine at any location that wasn't open to the public, that didn't meet certain other kinds of requirements, which meant that if I were able to find a way to innovatively deliver tickets, if you will, in the home of an individual or to a business travel accounts location without having to put my own people there, and therefore get some consolidation of resources and hopefully efficiencies, I couldn't do that.

I would like to refer back to some comments about Ticketron. Yes, Ticketron is in under the tent, so to speak, and can issue point-to-point tickets under the Yoder decision, but all the other agent communities are still bound by the marketing restrictions within that whereas Ticketron is not. So again, you have an unequal situation there.

Mr. **Packard**. I don't have further questions, Mr. Chairman.

Mr. **Mineta**. Mr. Vandergriff.

Mr. **Vandergriff**. Thank you, Mr. Chairman.

I would direct this question to either or both of the gentlemen. I have talked to several airlines relative to this legislation. Some of them, airlines that have benefited immensely from deregulation. In fact, some of them who wouldn't even exist if it were not for deregulation. On the other hand, I have talked to some airlines hurt, in my opinion, by deregulation. Still flying, but hurting. Different experiences resulting from deregulation. I have yet to talk to any airline representative, however, who wants to see this system changed.

Now bear in mind, I don't know all the airlines in the world. Most of them have never heard of me. So there hasn't been any scientific search here for their opinions. But I have made enough of these inquiries that it is striking to me that there is such unanimity. Would either or both of you gentlemen care to comment as to your reaction concerning this posture on the part of the airlines?

Mr. **Linen**. Congressman, I wish I knew as much about the airline business as I pretend to know about the travel agency business. I believe the airlines would, if I were in their shoes, find themselves in a somewhat ticklish situation in which as I have mentioned earlier, the majority of their tickets are distributed through 20,000-some travel agents, the majority of whom have a position one way or the other on this legislation. I think the airlines' position would tend to be, if I were in their shoes, one of "Let's not rock the boat. Therefore, let's not get too vocal on this issue, and see what happens."

I believe ultimately the airline, under the CAB decision, would have the right to decide with what agents it wanted to do business and with what agents it did not want to do business. I believe that the economic impact of having your own ticket stock out physically in somebody else's location is such that they would take great care in that decision.

Mr. **Vandergriff**. Mr. Hitchcock, would you care to comment?

Mr. **Hitchcock**. I am not sure I have much to add to that. Mr. Linen makes the correct point that the airline industry presently relies on travel agents for selling over 60 percent of their tickets. There have been efforts when airlines have tried to move away from the status quo in the past to find agents retaliation. An example, when United tried to lower commission rates a few years ago and agents booked passengers on other carriers. I think the "don't rock the boat" attitude might explain the current situation.

If airlines are satisfied with the situation, if they decide they do want to keep it even if the CAB decision takes effect, it will probably happen. I think what we are talking about is a situation not unlike the deregulation of the airline industry itself. What you saw after deregulation was new airlines come along, different ideas, they wanted to try different approaches to sell air fares and sets to the public. That is the sort of thing that I think we are talking about that you might see if the decision takes effect in that area.

Mr. **Vandergriff**. If the decision takes effect, is it conceivable that we will still have regulation of the travel industry, but indeed, it will be by the airlines themselves?

Mr. **Hitchcock**. Well, you have a form of regulation now through the common accreditation system. It is in effect self-licensing, such as you have in other areas, other professions.

Mr. **Linen**. I think one of the concerns that people have, Congressman, is what would happen to the interlining of tickets or baggage if antitrust immunity were removed. It is my belief that if I am flying from New York to Chicago to San Francisco, I, the consumer, am going to want to fly on the carrier or carriers that are going to exchange each other's tickets and they are going to exchange my baggage and that therefore the industry, even without the antitrust immunity, would find a way to preserve in an open market situation those important aspects of this industry.

Mr. **Vandergriff**. Thank you very much.

Mr. **Mineta**. Mr. Snyder?

Mr. **Snyder**. No questions, Mr. Chairman.

Mr. **Mineta**. Nice to have you here.

Mr. Anderson?

Mr. **Anderson**. Thank you, Mr. Chairman.

Mr. Linen, this somewhat follows up on Mr. Levitas' question on your size. To give us a little perspective on American Express' position in the marketplace, how did your air ticket sales in 1982 compare with those of the average travel agent?

Mr. **Linen**. On an average-by-average basis, averaging also is difficult, but if you look at it office by office, we are only slightly larger office by office than the average travel agency location throughout the United States.

Mr. **Anderson**. So how much would that be?

Mr. **Linen**. The number escapes me right now, Congressman. But it is somewhere over a million——

Mr. **Anderson**. The averaging on the travel agent was about $1.4 million, including sales and everything. Of course, the whole system you referred to, 70 percent, was some $21.8 billion total. I just would like to know, because I think if you see the size of your company, you will recognize, I think as Mr. Levitas is indicating, that you are not a little company. You are not a little mom and pop operation. You are big. And a few things like this could almost give you a monopoly.

I want to kind of let us see how big your company really is. How much of that travel sales did you make last year in total then?

Mr. **Linen**. To that point, Congressman, as I said before, we are about 130 offices out of 22-some-odd thousand which to me does not sound like a monopoly and we had less than 3 percent of the total sales going through the travel agency distribution system.

Mr. **Anderson**. What percentage then of the total $21 billion——

Mr. **Linen**. That would be less than 3 percent of whatever went through the agency system represents American Express.

Mr. **Anderson**. So you are 3 percent of that $21 billion that I mentioned?

Mr. **Linen**. I am not familiar with that number, Congressman.

Mr. ANDERSON. I am not too sure of how American Express operates. In my office, our business office in California, I use a travel agent because I find that they know, my travels are rather hodgepodge. I am jumping from place to place. I surely don't want to call every town where I want to say and so on. The travel agent does it. In my office also, I have a secretary who does considerable traveling. She uses American Express. Now originally, she used to call the airline direct to get the information. I said, "Why don't you call? Why do you have to call the airline? Why doesn't American Express?"

She says, "No, you can't get information there." Now, she is using my travel agent for information because she also books my flights that I pay directly. She uses my travel agent to get the information to buy her ticket from American Express. I asked her why. She said "For convenience of billing." Now, apparently you have some very good billing system that is better than individual travel agents have. Is there any way of knowing what percentage of your sales your tickets are sold because of the conveniency of your billing as against those who do want to find out where you can stay, how much the rate is, how you can interline, all these various questions, then if something happens, you come late, how you get on the next plane and what happens to your baggage and so on?

Do most of your people buy because of the convenience of billing?

Mr. LINEN. I am not quite sure that I am understanding you here, Congressman. I represent 130 offices of American Express that are in fact travel agents just like your travel agency. The American Express card and therefore the billing mechanism which I think you are referring to that your secretary may use in the purchase of her ticket have nothing whatsoever to do with what we are talking about today. I am here on behalf of those 130 travel agency locations just like those other 22,000.

Mr. ANDERSON. Would they know all the travel, the questions and answers that you would normally ask a travel agent about the booking and interlining and what is the next flight?

Mr. LINEN. I sure hope so.

Mr. ANDERSON. Then I am going to get after her to quit bothering my travel agent.

Mr. LINEN. We would be very pleased to have you as a customer, sir.

Mr. ANDERSON. What precisely does American Express want to do that is prohibited by the conference agreement as Judge Yoder recommended that they be handled?

Mr. LINEN. As I said earlier, I think what we really would like to see is a totally open situation where anybody who wants to get into the provision of tickets to the consumer can do so in the same context that any airline can. In other words, let's compete equally. Let's not have the collective organizations telling us how we must do something on their behalf while on the other hand they go do something differently.

Mr. ANDERSON. So there is nothing specific you want to do?

Mr. LINEN. Very much specific. There are lots of things happening in the marketplace today that the consumer would not be able to access through the travel agent community if this legislation were enacted. For example, all the things we have been talking about, what technology can do to drive service and innovation and reduce price which to me sounds like things that benefit ultimiately the consumer. We can't do those right now.

I would like to be able to say to our customers "We can do it on an equal basis with anybody and let's get on with it."

Mr. ANDERSON. Is that your electronic ticket delivery service or whatever you call it, is that basically one of your problems?

Mr. LINEN. That is one method of distribution which we would be precluded from participating in, yes.

Mr. ANDERSON. Didn't Judge Yoder disprove the rule against such operations that use a carrier's own ticket stock and therefore can't you negotiate such an arrangement under this approach?

Mr. LINEN. I believe that the Yoder decision as we have said earlier allows Ticketron to go in and have a relationship with the carrier to deliver point-to-point tickets but offer no advice. Yet, it did not allow travel agents to do that.

Mr. ANDERSON. Then can't you go in and negotiate that kind of an arrangement?

Mr. LINEN. On behalf of the consumer, my opportunity to go and have an arrangement with a carrier does exist under the deregulation environment. I don't believe the Yoder decision would allow me to do that.

Mr. ANDERSON. Does American Express also want the freedom to depart from the conference rules requiring experienced personnel at all locations?

Mr. LINEN. No, sir. We would like very much to have experienced personnel at all locations. We would just like the right to decide beyond a certain minimum standard what we think are the appropriate rules that should apply to managerial status and so forth.

Mr. ANDERSON. You then would basically want to be able to negotiate, American Express, rather, would basically want to negotiate its own agency arrangements in its entirety with each airline?

Mr. LINEN. If in an open market environment that is what it took to provide the kind of service and get going in the different kinds of ways of distributing tickets that ultimately we think would benefit the consumer then yes, we would be willing to do that.

Mr. ANDERSON. Then you would favor such bilateral arrangements for all agents and airlines?

Mr. LINEN. We are in favor, Congressman, of whatever works for the industry. We believe that restrictive policies which don't allow certain aspects of the distribution system to perform in an open market environment are anti to the best interests of that industry and the consumer.

Mr. ANDERSON. Thank you, Mr. Chairman.

Mr. MINETA. Before we conclude with this panel, this might be the appropriate place to note that the president of one of the larger travel agencies in the country, Ask Mr. Foster, Inc., asked us to submit his views. Ask Mr. Foster is opposed to the bill and favors the CAB's decision.

Without objection, that statement will be made a part of the record at this point.

[The statement of Ask Mr. Foster Travel Service follows:]

STATEMENT OF ASK MR. FOSTER TRAVEL SERVICE

The purpose of this memo is to declare ASK MR. FOSTER TRAVEL SERVICE's opposition to the passage of the Air Traveler's Security Act of 1983.

While in and of itself, we believe the Air Traveler's Security Act has merit in its aim to preserve the recognition and application of common ticket stock and related inter-carrier agreements, it is the bill's basic enforcement mechanism—namely the continuation of anti-trust immunity among the airlines on such matters as travel agency appointments and accreditation—to which ASK MR. FOSTER TRAVEL SERVICE objects. We feel such re-regulation places unnecessary, unwarranted controls in the hands of an airline conference system, when in reality the dynamics of the open market will get the job done with equal efficiency.

We certainly acknowledge that it is advantageous for individual airlines to continue to honor interline agreements. Indeed ASK MR. FOSTER cannot imagine circumstances under which carriers would withdraw from these agreements which operate so effectively in the marketplace, and are in their best interests, as well as the travel agent and the ultimate consumer. As such we do not think it is necessary for this congressional bill to pass in order to maintain the current system, or alternatively to create a new and even more economically viable method of ticketing and transporting airline passengers.

The mechanism of an open, unrestricted, competitive market has a proven record in other unregulated service industries for resolving such matters. In our judgment, there is no reason that it cannot accomplish the same positive results for the travel business.

Further, one of the key issues at stake, should this particular bill pass, is "where does the air travel re-regulation process end?"

In our opinion, a logical extension of such legislation might eventually lead to the granting of carrier anti-trust immunity in the control of air ticket pricing as well as the governing to the travel agency commission structure—both of which would represent major steps backwards for the general public as well as the travel agency industry.

In the final analysis, regulation only protects the most complacent and inefficient among the airlines and travel agents who comprise our industry.

Deregulation, on the other hand, will stimulate a dynamic process in which less competent, less creative performers will eventually be driven out. The result from such free-market forces will be the evolution of a stronger, more vibrant industry—a pattern we believe to be of immense benefit to the remaining members who make up the air travel related business community as well as the consuming public.

Mr. MINETA. While we are taking care of housekeeping, the subcommittee has received a letter from the American Retail Federation also opposing H.R. 2053 and favoring the CAB's decision. Without objection, that letter will be made a part of the record at this point.

[The letter from the American Retail Federation follows:]

AMERICAN RETAIL FEDERATION,
Washington, D.C., October 19, 1983.

Hon. NORMAN Y. MINETA,
Chairman, Subcommittee on Aviation, Committee on Public Works and Transportation, House of Representatives, Washington, D.C.

DEAR CHAIRMAN MINETA: The American Retail Federation would like to advise you of our opposition to H.R. 2053, which would restrict the marketing of airline tickets.

The American Retail Federation (ARF) is a national association of the retail industry; its membership consisting of 32 national retail associations and 50 state-wide associations of retailers, as well as corporate members.

The ARF has actively participated in Civil Aeronautics Board proceedings and on legislation concerning the regulation of air transportation.

The ARF opposes H.R. 2053 as fundamentally inconsistent with the increased reliance on marketplace competition in the Airline Deregulation Act of 1978. This legislation and the CAB's recent decision in the Competitive Marketing Investigation, place the same reliance upon the discipline of the marketplace in ticket marketing as in other areas of air transportation.

We agree with the Administration's statement of opposition to H.R. 2053 in the Director of OMB's letter of June 30, 1983, to James J. Howard, Chairman of the Public Works Committee.

The CAB's decision adequately provides a transition to a marketplace environment from outmoded regulatory constraints. We urge your opposition to enactment of H.R. 2053. We respectfully request that this letter be made part of the hearing record on H.R. 2053.

Very truly yours,

WILLIAM KAY DAINES.

Mr. MINETA. Mr. Hitchcock, Mr. Linen, again, thank you very much for your testimony and for helping to further inform the subcommittee as it tries to build its record on H.R. 2053.

Thank you very, very much.

Mr. LINEN. Thank you, Mr. Chairman.

Mr. HITCHCOCK. Thank you, Mr. Chairman.

Mr. MINETA. I would now like to call on a panel to be made up of Ms. Arlene Macchia, president of the National Passenger Traffic Association, accompanied by Mr. John Bacon from Tenneco, Inc.; Mr. Richard Stein, counsel for NPTA; Mr. Tim Hall from ITT QUME; and Mr. Bruce Ebert and Mr. Jim Gaines, Lockheed-California Co.

The full text of your prepared statements will appear in the record at this point.

[Statements referred to follow:]

Statement of Arlene Macchia
President, National Passenger Traffic Association
Before the Subcommittee on Aviation
Committee on Public Works and Transportation
U.S. House of Representatives
October 20, 1983

Mr. Chairman and Members of the Subcommittee -- I am honored to have the opportunity to appear before you to discuss the competitive marketing of airline tickets. As President of the National Passenger Traffic Association (NPTA), I want to express our strong opposition to H.R. 2053, a bill which would stifle competition in the sale of airline tickets and confer permanent antitrust immunity to travel agents. Accompanying me today are John Bacon from Tenneco, Inc. in Houston, Texas; Tim Hall from ITT-QUME in San Jose, California; NPTA Counsel Richard Stein; and Bruce Ebert from the Lockheed-California Company.

NPTA is an association of the in-house business travel departments, more commonly known as BTD's, of nearly 600 corporations, hospitals, educational institutions and government agencies ranging from Boy Scouts of America and the Muscular Dystrophy Association to Hughes Aircraft and the

Washington Post. NPTA also has 20 regional affiliates, which have another 850 corporate members.

Since business travelers are responsible for more than $19 billion in business travel annually -- more than half of all air travel -- we are naturally interested in promoting the most efficient and responsive system of marketing airline tickets. As advocates of competition in this area, we have been involved with the Civil Aeronautics Board's Competitive Marketing Investigation since its inception. Recent efforts to overturn the CAB's decision are of great concern to us.

THE CAB DECISION AND COMPETITIVE MARKETING

For over forty years the airline industry was one of the most heavily regulated businesses in our country. The federal government, through the Civil Aeronautics Board (CAB), determined where a carrier could fly and how much it could charge. It also approved agreements whereby airlines were restricted to appointing only travel agents to distribute their tickets. In 1938, when the statute creating the CAB was passed, air transportation, including ticketing, was an emerging industry and benefited from government involvement.

Today, air transportation is much different. It is a mature industry which requires little oversight or intervention by the federal government. The Congress has recognized this fact and has taken significant steps to remove the barriers to competition that have surrounded the commercial air transportation system since its infancy.

The CAB initiated the Competitive Marketing Investigation to determine how competition could best be introduced into the airline ticket marketing system. (CAB 79-9-64). The system they found was in many ways distorted, inefficient and lacking in meaningful incentives for innovation and competition. Simply put, the existing system did not exhibit all the signs one would expect from a competitive market. Several facts about the system at that time buttress this view.

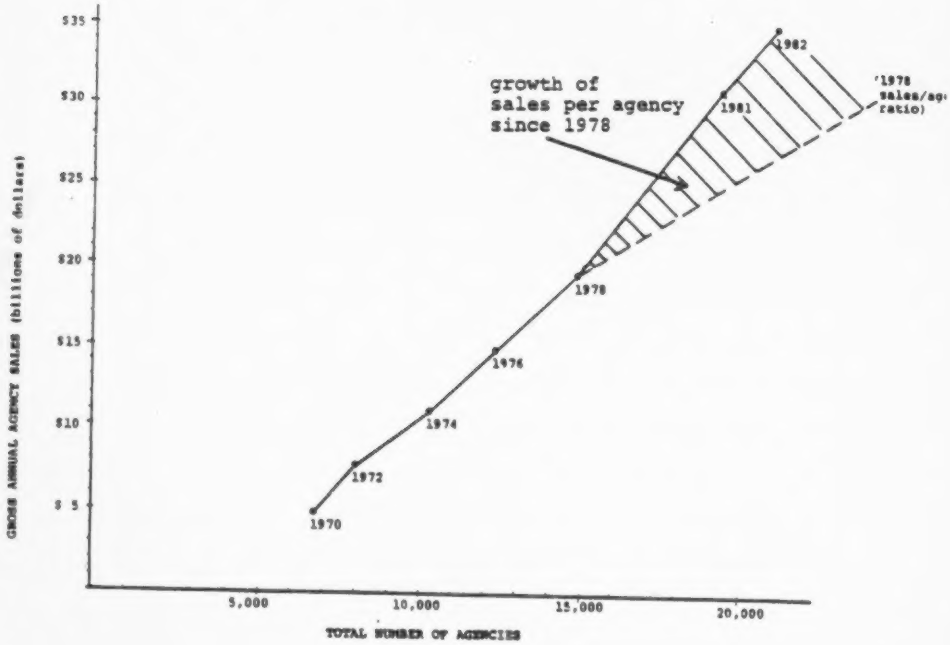
While many airlines face tough economic times, some even going bankrupt, the number of travel agents continues to rise -- from only 6700 in 1970 to over 22,000 in 1983. Although some travel agents claim their industry has been hurt by airline "fare wars", their total annual dollar volume has grown six-fold during the same period to $31 billion.

Sales per agency also continue to grow, despite increasing numbers of travel agencies. As Chart 1 on the following page shows, the ratio of number of agencies to annual volume has increased since deregulation in 1978, indicating that average volume per agency continues to outstrip the total number of agents.

The allocation of airline ticketing business has also changed. What originally was a market dominated by the providers of air transportation -- airlines -- has become a

GROWTH IN SALES VS. GROWTH IN AGENCIES

CHART 1



Despite increasing travel agency numbers, sales per agency continues to grow. On the average, an agency's annual sales have not been hurt by these new "competitors." In fact, since deregulation (1978) average agency sales have grown faster per year than in the previous six years.

YEAR	TOTAL NUMBER OF AGENTS	GROSS AGENCY SALES	AVERAGE VOLUME PER AGENCY
1970	6,700	$5 billion	$ 746,000
1972	8,000	$7.7 billion	$ 963,000
1974	10,260	$11 billion	$1,072,000
1976	12,240	$14.9 billion	$1,217,000
1978	14,804	$19.4 billion	$1,310,000
1981	19,203	$31 billion	$1,614,000
1982*	21,000	$34.6 billion	$1,647,600

*estimated

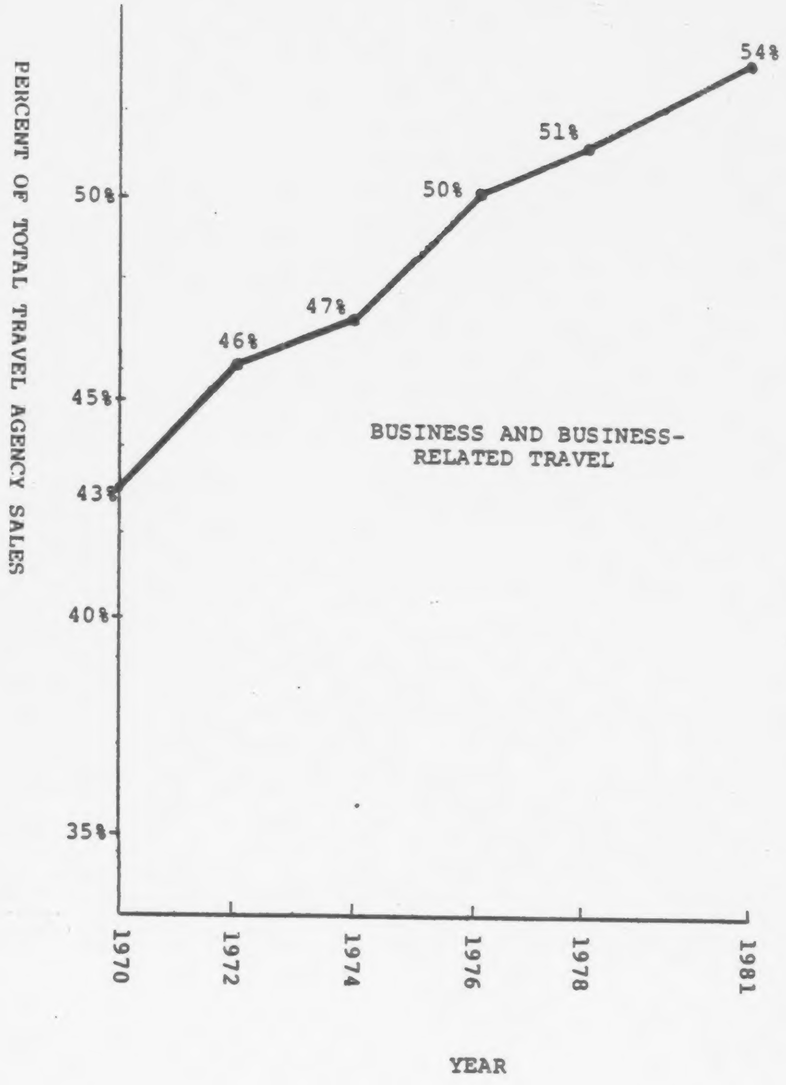
source: Travel Weekly's Louis Harris Study Issue, May 1982 market dominated by the agents of the airlines. Since 1978 alone, travel agents share of the airline ticketing market has ballooned from 38% to over 60% domestically and 80% internationally. Although travel agents originally were developed to handle "promotional" travel only, almost 20% handle exclusively corporate travel, and almost 90% do some corporate travel, the vast majority of which is rarely ever "promotional." Today, business and business related travel accounts for 54% of all agency sales. (See Chart 2).

With such a large number of travel agents, one might expect that competition among them exists. Yet, there apparently is little or no price competition. Travel agents all receive essentially the same commissions from the airlines.

Since 1978 agents sales commission rates have risen steadily from seven percent to nearly ten percent today. And these increases have been disproportionately high compared to other airline operating costs, especially in view of the apparently tenuous ability for airlines such as Braniff, Continental and Eastern to maintain solvency. Commission payments to agents have more than doubled from 2.8 percent of airline operating expenses in 1970 to 6.2 percent in 1982. Between 1981 and 1982 alone the total commissions paid out by airlines jumped almost nine percent from $1.95 billion to more than $2.2 billion while overall operating costs increased a little over one percent. Some individual carriers were hit

CHART 2

GROWTH OF
NON-DISCRETIONARY SALES
AS PERCENT OF TOTAL TRAVEL AGENT SALES



source: Travel Weekly Louis Harris Study Issue, May 1982 even harder. American Airlines saw its commission payments go up 16 percent (to almost $244 million) while United Airlines paid out 12.6 percent more in commissions in 1982 than in 1981, an increase totalling over $295 million.

Of course, escalating commission levels that increase airline costs are ultimately built into ticket prices for all consumers.

These facts raise an important question: Since the upward spiral of commission payments and travel agents' increasing market share are obviously costing the airlines and consumers, why have airlines not acted to reduce commission levels? And why are air carriers not offering corporate customers and other frequent flyers bulk discounts as the CAB said they could in 1981? The reason is simple but disturbing: air carriers fear travel agent reprisal.

Although most carriers will not discuss it publicly, travel agents, by virtue of their market dominance and the absence of meaningful competition, have the ability to influence airline marketing decisions and dissuade airlines from taking actions adverse to the interests of agents. The most common practice is to "plate away" from carriers that step out of line.

The history of the conference program since the CAB eliminated fixed commissions is filled with examples.

In February of 1980, the CAB withdrew the seven percent fixed commission and ordered airlines to make individual plans to compensate agents. United Airlines was the first to respond coming in with a proposal to pay a flat $8.50 per ticket transaction. But that proposal generated so much opposition among agents that United quickly withdrew it and replaced it with a sliding scale of payments ranging from $7.50 to $37.50 depending on the distance flown.

Despite its policy reversal United was not left unscathed by its innovation. In March, the airline showed a 14 percent drop in traffic. At the time, Newsweek magazine reported one San Francisco agent saying that she redirected 30 percent of her United business to other airlines.

A travel agency president in Florida wrote an editorial in Travel Trade News Edition which warned,

> "...If United does not revise its $8.50 per coupon fee I will not sell any United ticket or any tour using United as the carrier. I am prepared to return the United plate if the airline does not maintain its present commission percentage policy."1/

Another agent in Los Angeles confessed his reaction. He is quoted in the same publication as saying,

> "First thing I did was to request my office staff to lay low in selling United Airline tickets unless the client particularly wanted United routing. Otherwise they were to route each client to other carriers."

1/ Travel Trade News Edition, April 28, 1980, p. 67.

Even the president of a large travel agent organization said, when he heard about American Airlines' recent proposal to drop commissions from 10 to 9 percent, that his agency would have to "look very carefully at its American Airlines sales and decide whether or not it should continue with that kind of productivity."[2]

Statements on the record before Judge Yoder provide ample evidence that agents not only have the power to influence the airlines but are willing to do so when necessary. Following a decision to lower commissions, James Palm, Director of Sales Development for Republic Airlines, noticed a sudden decline in traffic and made this observation on the record,

> "Our feedback from our district sales people indicated that we were losing groups...on a couple of occasions we were informed that individual travel agents were instructing their people to use us only when they had to, and things of that nature."[3]

Last year Frontier Airlines attempted to lower its commission rate from ten percent to nine percent. It was "plated away" from so heavily that it was quickly forced to return its commission to the original level.

Other airlines spoke directly about commissions in testimony before Judge Yoder. Randall Malin, Senior Vice

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[2] Travel Weekly, August 18, 1983, p. 101.

[3] 52 Tr. 136, CAB Docket 36595.

President of Marketing for U.S. Air, responded to cross examination in the following manner:

> Q. "Now with respect to your decision to raise the commission level from nine to ten percent, is it fair to say that as a part of your decision making process you considered the risk that you might incur of having traffic diverted to other carriers in the event you did not raise the commission?
>
> A. Yes, I did.
>
> Q. So was that the principal factor in determining to raise the commission level?
>
> A. Yes, it was.

Roger Nesbit, Director of Passenger Sales Accounting, Continental Airlines, responded to a similar question:

> Q. With respect to the recent increase in commissions that we talked about from nine percent to ten percent, were you concerned about diversion of Continental's sales to other air carriers in the event that you would not have increased your commission level?
>
> A. Yes, that would definitely be a consideration.
>
> Q. Would you agree that it was at least the risk of diversion that motivated in part the change in commission levels from nine percent to ten percent?
>
> A. In part, yes.
>
> Q. If not actual diversion?
>
> A. Yes.

Although these examples by themselves raise serious questions about the existing ticket distribution system, it was the basic structure of the system -- particularly travel agent exclusivity and antitrust immunity -- that the CAB found fundamentally objectionable in its 1982 decision. I would now like to turn the committees attention briefly to that decision.

The Board found that the exclusivity provisions which had been built into the carrier conference agreements had the practical effect of making travel agents the sole distributors of airline tickets.

For many years, conference agreements between the airlines and travel agents have contained "exclusivity clauses" requiring member airlines to market their tickets exclusively through member travel agents. Because virtually all major airlines are members of these conferences, the exclusivity clauses effectively prevent the marketing of tickets except through conference-accredited agents. To this extent, *airline tickets are marketed through a restricted distribution system with travel agents possessing a monopoly on access to that system.*

The Board found that these exclusivity clauses substantially reduced competition and were unnecessary for the continuation of the conference system. At the same time it concluded that continued protection from the antitrust laws was neither necessary nor desirable. Immunity from the antitrust laws allows airlines and agents to enter into agreements which otherwise could not legally have been reached. As a result, the government is placed in the position of indefinitely overseeing those agreements and determining, on a case-by-case basis, which are the most desirable for consumers.

While the Board favored competition in ticket marketing and disapproved both agent exclusivity and antitrust immunity it was careful not to disturb the essential elements of the existing system of "common accreditation" which was generally favored by all parties, including NPTA. Only those provisions which unnecessarily reduced competition and thereby curtailed the benefits of the program were disapproved.

The Board was also careful in its evaluation of the existing standards for accreditation, leaving the current requirements nearly intact. All interested parties, including NPTA, clearly recognize the value of meaningful standards which reasonably relate to sound business practices. The CAB noted, however, and NPTA agrees, that some of the standards which it approved may still unnecessarily restrict competition and should be re-evaluated during the generous two year transition period before antitrust immunity is withdrawn.

Accreditation, then, has not been discarded. Reasonable standards should and will continue to exist for conference agents. It would also be perfectly reasonable for airlines to have minimum qualifications for non-conference marketers it may choose to appoint.

PROBLEMS WITH H.R. 2053

As you know, Mr. Chairman, H.R. 2053 orders the CAB to vacate its 1982 decision in favor of competitive marketing and adopt instead an earlier finding by Administrative Law Judge Ronnie Yoder. In NPTA's view, this would be a serious mistake. The Yoder opinion not only continues the travel agent monopoly on access to the ticketing market but it perpetuates antitrust protection which would negate everything the CAB tried to do in its decision.

The Yoder decision is plainly at odds with the policy set by Congress in the Airline Deregulation Act of 1978. It is fundamentally anti-competitive in its retention of travel agent exclusivity and antitrust immunity. Its premises and most of its substantive provisions were rejected by the CAB and should not be embraced by Congress now.

The Yoder opinion flatly prohibits airlines from appointing non-conference-accredited persons as their "agents." It thus endorses travel "agent exclusivity" and preserves agents' monopoly on access to the conference system. Moreover, the definition of "agent" adopted by Yoder represents a departure from traditional legal construction of the term. Rather than recognizing that an agent is any "person or firm empowered to act in behalf of another," Yoder narrowly defines "agents" as only those organizations which are accredited for distribution by ATC or IATA.

The Yoder decision does indicate a disapproval of "marketing exclusivity," meaning that an airline, theoretically, could venture outside the conference system to utilize other distribution outlets. Yet, the opinion contains several provisions which would stifle any innovative efforts to use non-conference marketers.

Most importantly, the opportunity for carriers to operate within the protected environment of the conference -- insulated from prosecution for anti-competitive activities -- creates a major deterrent for carriers to venture outside the system. Collusive efforts between carrier and agent are still possible. The entry of actors who could reduce these collusive powers is precluded, because the agreements are immune from legal recourse.

The removal of "marketing exclusivity" by itself is thus an empty promise which would have little or no pro-competitive effects.

H.R. 2053, by adopting the Yoder decision, would prevent new and more efficient distribution systems and discourage competition among retailers who might offer lower commissions and different types of services. Business travel departments, discount ticket offices, part-time distribution outlets, phone-only distribution firms, as well as many banks, credit card companies and firms yet to be identified would be effectively excluded. No incentives would exist for innovation and efficiency, even for travel agents themselves.

I can imagine a day when I can call up airline reservation systems on my interactive, two-way cable television screen and make a reservation directly with the airline, perhaps at a discount since no commission would be paid. This would save consumers and airlines money. I can also imagine a situation similar to that which occurred in the securities industry following its deregulation in 1975. Discount brokerage houses sprang up offering to handle simple transactions for those customers who knew exactly which stocks they wanted to buy. In some cases, commissions on those services are now about half what they were prior to deregulation.

Not only are new distributors excluded under Yoder, but existing travel agents are denied the flexibility to respond to changes in ticketing service demands that the CAB's decision would allow.

Exclusivity also forces airlines to pay full-service commissions to agents regardless of the nature or level of the service they provide. Airlines pay the same 10 percent commission on every transaction regardless of whether it is a ticket to London, England or New London, Connecticut, or whether the agent simply wrote a ticket or engaged in extensive travel planning.

The Board's decision allows for the "unbundling" of travel services, and the opportunity to make commissions more reasonably related to the nature and level of service provided.

BUSINESS TRAVEL DEPARTMENTS

Before I address some of the arguments made by proponents of H.R. 2053, I would like to talk specifically for a moment about business travel departments -- how they operate, their relationship with air carriers and their functions as compared to travel agents.

Corporation, hospitals, educational institutions and other organizations which engage in business travel have basically three options in deciding how to manage their travel: the "in-house" option, where an organization does all its own travel and probably deals directly with the airlines; the "inplant" option, where the organization conducts its own business travel in "partnership" with an independent travel agency; and the "full service" option, where the organization contracts out all its work to a travel agency.

In each case the compensation is different. With the completely in-house method the BTD does all the work, obviating the need for a travel agent, but it receives no compensation from the airlines. Although BTD's are fully compensated by other travel entities such as hotels and car rental agencies, in the inplant situation, travel agents receive about a three percent commission from the airlines of which a negotiated amount (usually about two percent) is passed on to the BTD. The inplant travel agency receives the remaining one percent primarily for allowing the BTD to use its plate. Usually the operation is run entirely by the BTD with its own ticket terminal and booking operation -- the inplant agency does little or no work. Finally, under a full service arrangement, a travel agency receives the full 10 percent commission on the organization's business. The company receives nothing.

Most BTD's provide a service remarkably similar to that which travel agents provide. In fact, BTD's are at least as well equipped, perhaps better equipped, in several respects to fulfill the distribution and sales function for the business traveler and provide ticketing services to airlines.

First, most BTD's currently have the same professional competence and capabilities as travel agents, including computerized equipment, ticket stock, interlining authority, training and good relationships with the airlines.

Second, unlike travel agents, BTD's have a clear motivation to identify the best air travel arrangements at the lowest cost. Their recommendations would not be influenced by the special benefits, such as free trips and sales overrides, now offered to individual travel agents.

Third, inplant BTD's receive up to three percent commission by handling all of the organizations business travel, using an agent's plate, becoming in effect an extension or functional equivalent of the travel agency. The nearly 600 inplant BTD's currently in operation are convincing evidence that airlines have recognized the value and competence of BTD's in the provision of ticketing services.

Let me now turn the Committee's attention to the arguments of those who would reject the CAB decision.

ARGUMENTS OF THE OPPONENTS OF THE CAB DECISION: A CLOSER LOOK

It is unfortunate that public discussion of the Board's decision has been clouded by a number of unsubstantiated and overstated charges suggesting in various ways that competition in marketing will lead to the wholesale collapse of the air transport system as we know it, and that as a result consumers, airlines and, of course, travel agents will suffer. These assertions are false and I would like to take a few moments to tell you why.

To begin with, if we believed the efficiency of air transportation would be undermined, NPTA would not be opposing H.R. 2053. Business travelers rely more than any single group on efficient and dependable air transportation. If the system were to fall apart tomorrow, become more costly or less efficient, we would be the ones to suffer most. We obviously don't believe this will happen. The CAB did not believe it would happen either.

It has been asserted that competition in ticket distribution will drive hundreds of travel agents out of business. There is no basis in fact for this claim.

Travel agents provide a valuable service -- to airlines, to discretionary travelers, and to the majority of the business community. As long as agents serve as consciencious representatives of the airline principals and provide competent advice to their clients, they will remain a dominant force in ticket marketing. And, in fact, the Board's decision does not force them to change. It simply allows airlines marketing options which have been denied them for nearly 40 years.

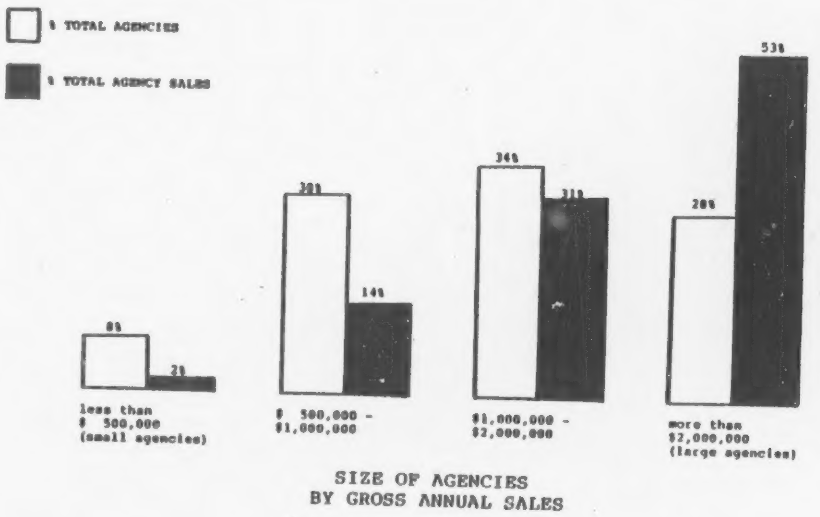
Empirical data also belies the claims that agents will be put out of business. In fact, revenue losses from travel agents due to the participation of BTD's or other non-conference marketers are likely to be minimal.

To begin with, if airlines decide to appoint business travel departments as ticketing agents, the impact will be felt not by most small travel agencies but by the largest agencies. It is also important to note that many organizations do not and will not find it cost effective to set up business travel departments. Most medium and small corporations probably will not establish a BTD. A 1978 study found that 20% of the travel agents which handled corporate accunts dealt exclusively with large corporations. It is this limited group of large agents who might be affected by competition from BTD's. The small agencies will probably not be affected at all.

The large travel agencies themselves control a sizeable and growing share of the market. Only 28% of the large agencies are handling over 53% of all agency sales and nearly 60% of total corporate sales. (See Charts 3 and 4 on following

CHART 3

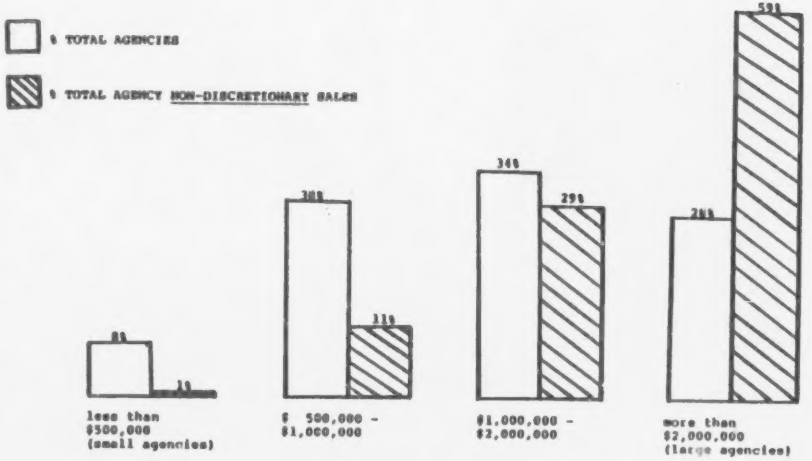
1981
AGENT-HANDLED SALES CONCENTRATION BY AGENCY SIZE



source: _Travel Weekly's Louis Harris Study Issue_, May 1982

CHART 4

1981
CONCENTRATION OF
AGENT-HANDLED NON-DISCRETIONARY SALES



source: Travel Weekly's Louis Harris Study Issue, May 1982 pages). In fact, one travel agency alone handles travel for 105 corporations.

The American Society of Travel Agents' (ASTA) own testimony before the CAB estimated that BTD sales handled would increase by only $250 million.[4/] As a fraction of all $19 billion in business travel, that represents only about a 1.3 percent shift. And it assumes that all the lost business would come from sales previously made by agents. Actually, the bulk of that business is likely to come from the largest travel agencies. Hence, the assertion that small travel agencies will be displaced by BTD's is factually unfounded.

Even taking into account the impact of all potential new distributors, the ASTA witness predicted that travel agents total market share would only drop from 53 percent to 51 percent -- a two percent drop in agency sales.

Recent attempts to dispel the significance of these figures should be viewed with skepticism since they often are premised on the assumption that both the common accreditation system and reasonable competency requirements will collapse -- an assertion for which no compelling evidence has been brought to bear.

Some proponents of exclusiviy have taken the position that airlines will abandon the common accreditation system and other

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[4/] Exhibit ASTA-20, p.111, CAB Docket 36595. (See, Appendix 1 infra) arrangements in which they now participate. On the one hand, they argue that these arrangements are both efficient and economical to airlines, agents and customers. But at the same time they suggest that the system is so fragile that it will surely collapse with the introduction of competition. This is sheer folly. Air carriers have every incentive to maintain high standards. Reliable ticket distribution is vital to their business. Common accreditation is also an effective means of marketing their tickets. They have every reason to continue to participate.

In fact, the CAB could only find one airline that said it might seriously consider withdrawing from the conference if antitrust immunity were removed.

It has also been suggested that under competition carriers would abandon their practice of using interline agreements for travel involving more than one airline, thereby forcing travelers into the grim task of carrying their luggage from one airline to another. This is ridiculous. Interline agreements permit one airline to write air transportation on other airlines that are parties to the agreement. When one carrier writes a ticket involving another, the first carrier is responsible for any loss. Carriers are not at any greater risk under the CAB's decision than they already were. The CAB explicitly found that exclusivity is not necessary for interline agreements to continue. Carriers will certainly continue to make such cooperative arrangements in a competitive environment because the convenience and economic incentives of the agreements will continue to exist.

Even airlines themselves have reached these conclusions. In a recent interview in Travel Weekly, John Zeeman, Senior Vice President of Marketing for United Airlines, spoke frankly about the removal of exclusivity and antitrust immunity and its effect on airlines participation in the carrier conference and interlining. When asked if carriers would abandon these practices Zeeman replied,

> "There may be some that would, I doubt it. I think that from our evaluation of that system it will pass any screen. And I think most of the carriers will come to the same conclusion and they will realize that it is a very effective way for both the airlines and the agencies to conduct their business. I don't see that going away with or without antitrust immunity.
>
> "The same thing I would say of interlining in terms of bags. The basic way that the airline industry conducts its business, I think, would be retained with or without antitrust immunity."5/

Opponents of the CAB decision have also suggested that airline tickets will be sold by persons who will not know what they are doing -- gas station attendants, bartenders or the "butcher, baker and candlestick maker." This is preposterous. There is absolutely no reason why airlines would ever allow unqualified persons to handle their tickets. Ticket stock is

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5/ Travel Weekly, May 16, 1983, p. 8.

like a blank check. It would be foolhardy to hand it over to an incompetent distributor. Airlines have a legal responsibility to provide air transportation or refund the ticket. They have strict requirements for ensuring the safety of ticket stock -- vaults or safes, precise accounting standards, etc. -- which all distributors must fulfill. And, as I explained, carriers are financially responsible for any tickets that are written which connect to another carrier. If nothing else, airlines can ill afford to have its customers suffer inconvenience or loss at the hands of incompetent ticket distributors. Airlines are likely to insist on high standards even for its non-conference marketers.

Finally, to further muddle the question of whether airlines should be permitted to appoint non-conference marketers, it has been suggested that BTD's are really purchasers of air transportation and therefore should not be compensated by the airlines. From the outset, one would think that compensation is something that airlines are capable of deciding on their own. After all, it is the airlines' product that is being sold. They should have freedom to appoint and remunerate whomever they choose for marketing their product. As I have explained, travel agents and airlines have already recognized, through the use of inplants, that BTD's are in effect the functional equivalent of travel agents. They interact with airline computers. They make reservations. They have their own ticket stock and already write tickets. And, they interline. From the perspective of the airline, BTD's offer the same sales and distribution function as a travel agent. The only difference is that the travel agent is paid by the airline for what it does. The BTD is not.

To bolster the claim that BTD's should be disenfranchised some proponents of H.R. 2053 have suggested that the primary objective of BTD's is to produce revenue for their affiliated organizations. Certainly proponents of H.R. 2053 are not suggesting that existing travel agents are not in business to make money. BTD's are primarily interested in reducing their costs while serving their clientele, but motivations are irrelevant to this debate. BTD's are not asking for special treatment. They simply want the opportunity to compete fairly in the provision of travel arrangement services and for the airlines to have the option to reimburse them for the costs of those services.

A similar argument has been made that BTD's are attempting to force airlines to provide them with discounts. This is patently incorrect, and those who subscribe to this belief have confused the terms "discount" and "commission."

A discount is a reduction in product price, usually for customers who make bulk purchases. In this case the product is air transportation. Any purchaser of air transportation could be eligible for a discount whether it is a company, the federal government, or the participants of a Boy Scout convention. The existence or non-existence of a BTD is irrelevant to the granting of discounts by airlines.

By contrast, a commission is a fee paid to an individual or organization for the provision of a service -- in this case the selling of an airline ticket that the airline would otherwise have to sell itself. Only those that provide the service are eligible for the commission.

If a BTD provides a service to an airline -- in fact the same service that travel agents provide -- it should be eligible for compensation for its work. This does not seem to be an unreasonable proposition, especially when a BTD may be willing to provide the same service for less compensation.

Thus, paying BTD's for their service to airlines is no different than the commission paid to travel agents for the same service, and it is completely unrelated to the granting of bulk discounts to purchasers of air transportation.

The CAB decision also noted that it is acceptable business practice for a firm to profit from sales to itself. Not only is there no legal prohibition to such a practice but it is a well accepted economic principle in other sectors of our economy. The CAB has already addressed this concept in an analogous area. In the context of air freight transportation the Board approved the airline practice of compensating individuals not affiliated with the carrier for preparing cargo for shipment. This was true even where the user and the preparing agent were one in the same entity.

CONCLUSION

In conclusion, Mr. Chairman, this bill has enormous implications for the airline ticket marketing system in this country. It turns back the clock on everything the CAB has done to carry out the mandate of Congress to permit competition and innovation in the airline industry. Indeed, it brings us back to a time of exclusive access, antitrust protection, and all the distortions of a protected market.

The CAB said that the time has come to eliminate travel agent exclusivity and give airlines the freedom to market airline tickets as they see fit without the intervening hand of government. The evidence on the record supports this decision.

H.R. 2053 says, no, we should not only give travel agents back their antitrust immunity but we should make it permanent.

The National Passenger Traffic Association urges the Congress to reject H.R. 2053, which would reverse the CAB decision and deny the public the many benefits of competition. Let us allow the free market to work so that customers and airlines can obtain the best value at the lowest cost.

Thank you very much.

APPENDIX I.

AMERICAN SOCIETY OF TRAVEL AGENTS (ASTA)
ECONOMIC WITNESS HEARING EXHIBIT
PAGES CONCERNING EFFECT OF NEW DISTRIBUTORS
ON AGENTS' MARKET SHARE

Docket 36595

Exhibit ASTA-20
Page 110 of 168

Table III-1. Estimated Proportion of Domestic Airline Tickets Sold by Type of Distribution - Before and After the Abandonment of Exclusivity

Type of distribution	Percent sold within type with exclusivity	Percent of total	Percent sold within type without exclusivity	Percen of total
Total Domestic Sales	--	100	--	100
Travel Agents				
Nationwide agencies	7		7	
Agency coops	18		24	
Franchises	1		1	
Accredited banks	2		2	
Independent agents:				
Commercial specialists	18		14	
Full-line service	54		52	
Wholesalers/ Tour operators[a]	[4]		[5]	
Bulk contractors[a]			[5]	
Total travel agents	100	53	100	51
Pure Ticketing Services				
Ticketron	100		86	
All others[b]			14	
Total pure ticketers	100	-	100	2
Other Ticketers				
Business travel departments	63		68	
Government offices	32		24	
Nonprofit groups	5		8	
Total other ticketers	100	5	100	7
Airline Offices:				
ATO/TBM	7		8	
CTO	86		85	
SATO	7		7	
Total airlines	100	42	100	40

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a. Figures in brackets not included in total to avoid double counting.

b. This might include large retail chain stores and Airline Tickets By Banks.

Source: Table I-2 and RRNA estimates

Table III-2. Estimated Dollar Amounts of Domestic Airline Tickets Sold by Type of Distribution - Before and After the Abandonment of Exclusivity
(Millions of dollars)

Type of distribution	Estimated dollar amount within type with exclusivity	Estimated dollar amount within type without exclusivity
Total Domestic Sales	18,666	18,666
Travel Agents		
Nationwide agencies	665	670
Agency coops	1,834	2,280
Franchises	80	100
Accredited banks	160	160
Independent agents:		
Commercial specialists	1,797	1,386
Full-line service	5,349	4,966
Wholesalers/ Tour operators[a]	[375]	[475]
Bulk contractors[a]	-	[475]
Total travel agents	9,885	9,562
Pure Ticketing Services		
Ticketron	11	300
All others[b]	-	50
Total pure ticketers	11	350
Other Ticketers		
Business travel departments	600	850
Government offices	300	300
Nonprofit groups	50	100
Total other ticketers	950	1,250
Airline Offices		
ATO/TRM	662	600
CTO	6,658	6,404
SATO	500	500
Total airlines	7,820	7,504

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a. Figures in brackets not included in total to avoid double counting.

b. This might include large retail chain stores and Airline Tickets By Banks.

Source: Table I-2 and RRNA estimates.

ORAL STATEMENT OF TIMOTHY HALL*
ON BEHALF OF THE
NATIONAL PASSENGERS' TRAFFIC ASSOCIATION
BEFORE THE
SUBCOMMITTEE ON AVIATION
U.S. HOUSE OF REPRESENTATIVES

Mr. Chairman, Members of the Subcommittee, I am Timothy Hall, a corporate business travel manager* appearing here today on behalf of the National Passengers' Traffic Association (NPTA).

Business travel departments (BTDs) play an increasingly important role in the current ticket marketing environment as well as the market envisioned by the CAB. We hope by our testimony today to explain, based on our own experiences, what a BTD is, how it operates, and what services it provides to airlines.

I feel particularly well qualified to discuss the role of BTDs in a competitive environment because I have worked for an airline, a travel agency and a corporate business travel department.

As you are aware from previous testimony, business travelers account for $19 billion in travel expenditures annually -- more than half of all air travel. In many companies, business travel is the second largest expense next to salaries. All organizations engaging in substantial amounts of travel, regardless of their size, must find ways of managing it in the most cost effective and efficient manner. In general, there are three basic options available for doing this: (1) "in house", (2) "in-plant", or (3) through the use of an outside travel agency.

I would like to discuss each briefly, drawing on my own knowledge of corporate travel management.

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* Mr. Hall is Corporate Travel Manager, ITT QUME, San Jose, California.

IN-HOUSE TRAVEL DEPARTMENTS

An in-house or business travel department (BTD) is responsible for arranging all of the organization's travel. The BTD generally is located on the premises of the organization and is not officially connected with any outside travel agency. As a result, the parent organization must bear the entire cost of the operation -- a cost which is often quite substantial. The size and responsibilities of in-house travel departments vary greatly, depending on volume and travel patterns. Typically, in-house BTDs make reservations, deal directly with airlines, interact with airline computers, write tickets and perform nearly all of the functions normally associated with travel agents.

Despite the operating costs associated with in-house BTDs, they provide several advantages that make them attractive to many organizations.

1. The BTD can assure conformance to company travel policy and enables the company to stay on top of changes in the travel industry. In most cases, the BTD is the major contributor in formulating and updating corporate travel policy.

2. Having a centralized department to collect data helps travel managers negotiate bulk travel arrangements with suppliers in an orderly fashion.

3. BTD employees can work to eliminate abuse by alerting management of unauthorized downgrading of tickets, abuse of travel expense accounts, and other violations of company travel policies.

4. BTD employees becomes air fare specialists in the markets in which their company travels. BTDs exist because they can provide good service, at reduced costs.

5. A BTD serves its company exclusively. This can be a big advantage over a travel agency that is busy with other corporate clients as well as personal travelers.

6. Through research and analysis, travel department personnel can determine reasonable per diem rates, thereby establishing specific rates for different destinations.

7. An outside travel agency is not in a position to deny travelers' extraordinary requests. The BTD personnel, with support from management, can monitor such requests and ensure that they conform to established policy.

8. In-house control provides a greater opportunity to provide confidentiality of travel plans when the company finds it desirable.

Yet, the business travel department, since it has been excluded from the Air Traffic Conference, can not be paid at all for its work by earning commissions from the airlines. This is, in my experience, the major reason why many BTDs have converted their travel operations to what is known as "in-plants."

IN-PLANT TRAVEL DEPARTMENTS

An in-plant BTD agreement involves a written contract between a corporation and a travel agency which, in effect, allows the travel agency to set up a branch office on the premises of the corporation. Commissions earned from airline carriers are "shared" between the two parties, subject to guidelines established by the Air Traffic Conference. Generally, travel agents receive about a three percent commission on domestic travel from the airlines, of which about 75-80 percent is passed on to the company travel department as its share. The travel agent keeps the balance for allowing the in-plant BTD to use its name, or plate, to purchase tickets. An in-plant travel department can be staffed with corporate employees, personnel provided by the agency, or a combination of both. Most often, however, the BTD is run exclusively by corporate employees.

The services provided by such an in-plant BTD are fundamentally identical to those provided by travel agents, including the making of reservations, interlining, interacting with airline computers and writing tickets. In-plants are, in effect, the functional equivalent of most travel agencies.

Many of the advantages of an "in-plant" arrangement are identical to those of the "in-house" BTD, with some important additional benefits:

1. Companies, through the shared commission agreement, receive reimbursement for operational expenditures;

2. Back-up personnel from the partner agency are available to supplement staff due to vacations, high travel periods, etc; and,

3. Depending on the agency, extra services, such as management reports, negotiated hotel rates, etc, are available.

OUTSIDE TRAVEL AGENCIES

Those corporations that do not find it cost-effective to manage their own travel must turn to an outside travel agency. This method involves the lowest direct cost to the corporation, but the highest direct cost to airlines.

A corporation with this arrangement usually identifies its own air travel needs but, since it cannot become accredited as an authorized agent, it must operate through an existing travel agency. Although business directed to agents is "non-discretionary," travel agents still receive the same 10 percent commission from the airlines.

A company bears no direct costs since it does not have to set up a full-scale travel department, but it does lose a degree of control over its own travel planning. For this reason, an increasing number of companies have at least one individual who acts as a coordinator between the agency and the business traveler, monitoring the company's travel and assisting in the formulation of travel policies. Yet the majority of corporations and other organizations have been relying, and will continue to rely, on outside agencies. For them, the advantages of in-house capabilities simply do not outweigh the costs involved.

To further illustrate the real differences between these options and their impact on the airlines, travel agents and BTDs, let's use as an example the case of making my own travel arrangements to Washington, D.C.

If my corporation had an in-house BTD, I would have made my airline reservations through our own airline reservation computer, printed the ticket, packaged it and been on my way. To accomplish this, I would have viewed my flight selections, checked the fares, and selected the flights that best fit my schedule, while providing the lowest fare. I would have made my own hotel and car reservatons. In effect, I would have done all the work in preparing my itinerary, obviating the need for a travel agent. But my company would have received no compensation from the airlines. Since no travel agent was involved, the airlines would not have had to compensate a travel agent either.

Now let us look at what would have happened if my firm operated an in-plant travel department. On my ticket to Washington, approximately $500.00 round trip, a commission of $15.00 (three percent) would be paid to the travel agency, not including any overrides the airline might pay. My company would receive about $11.25 of the $15.00 from the agent.

This may not seem like a large cut of a $500 ticket, but the cumulative sum of such commissions can be staggering. For example, in a company with a $20 million annual travel account, not unusual in large firms, the travel agency working under an in-plant partnership arrangement would receive about a $200,000 share per year for doing little or no work. The business travel department, having done all of the work in servicing their business travellers, would receive $400,000 from the commission pool. I might add that had a travel agency servicing this account identically, but as an outside agency, their ten percent commission would net them a staggering $2 million.

Travel agencies in establishing an in-plant BTD agreement are merely conduits for travel arrangements; their work is done when the initial paperwork is complete and the ATC and IATA appointments are granted. They continue to share, however, in the commission split for years after those appointments are received.

There are now approximately 500 in-plant BTDs in operation and at least that many travel agencies that have profit-sharing relationships with them.

Finally, using my $500 flight to Washington, as an illustration, if my company had operated through a full service arrangement, I would probably have researched my travel needs in advance and then called an agency, told them which flight I wanted and which hotel and car rental I needed. They would have made the reservations, printed the ticket and confirmed and delivered the package to my office. The travel agency would have received the full 10 percent commission or approximately $50.00 plus any overrides on my $500.00 ticket. My firm would have receive nothing.

I hope that this information I have brought you today of the role of the business travel departments and their relationships to travel agents has been helpful to you and will assist you weighing the legislative proposals before you.

TESTIMONY OF BRUCE P. EBERT

On governmental regulation of the relationship
between airlines and travel agents
before the Subcommittee on Aviation
of the Committee on Public Works and Transportation

U.S. House of Representatives

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to appear before you.

My name is Bruce P. Ebert. I am on the Legal Staff of the Lockheed-California Company. I am an attorney admitted to practice in California.

I want to express Lockheed's strong opposition to HR 2053 in that if it is enacted we foresee that commissions on airline tickets that Lockheed has been receiving during the past year for the in-plant business travel services being provided by Lockheed could again be denied. Should this occur, Lockheed might be forced to forego airline ticket commissions at a time when Lockheed, as well as many other Government prime contractors, are under ever increasing pressure to reduce their cost of doing business with the Government.

Because of the threatened loss of reimbursement, Lockheed was asked to testify in this matter because its experience over the past two years refutes statements contained in the Yoder decision as well as statements recently made by the President of the Association of Retail Travel Agents (ARTA) and others before the Senate Subcommittee on S 764. Their statements indicate that industry has established direct relationships with carriers for the purpose of obtaining discounts. These statements, while simply put, are not correct.

Approximately two years ago, Lockheed-California Company initiated two studies relative to cost reduction/improvements in its

Business Travel Department (BTD). The Lockheed-California Company BTD, at the time these studies were initiated, had been in existence for approximately 32 years and was operating with an annual travel budget of approximately $9 million. To place this volume of business requires six full-time employees. It should also be noted that the total volume of travel business generated by all Lockheed companies is in excess of $40 million.

The first study initiated by Lockheed had two purposes. One such purpose was to evaluate the feasibility of closing the Lockheed-California Company BTD as a cost economy move and to have all travel services provided by an outside travel agency. The second aspect of the first study was to ascertain the feasibility of cost reduction through an in-plant arrangement made possible by the CAB's decision in the Transmark case.

The first Lockheed study group evaluated 16 plus travel agency proposals, of which only four of the proposals were found to be acceptable. The unacceptable proposals were from travel agencies which were deemed to have insufficient staff or resources to handle the volume of business which would have been generated by the Lockheed account. The high rejection rate based on inadequate resources is not surprising, in that as stated in ARTA testimony before the Senate Committee, approximately 95 of this nation's travel agencies have annual bookings of less than $5 million per year.

With regard to the four acceptable proposals, Lockheed found that all four offers were virtually identical in terms of the services offered. In essence, there were no competitive differences between the four acceptable proposals and, hence, Lockheed does not agree that today there is real and effective competition between travel agents.

With respect to the second aspect of the study, namely that of an in-plant affiliation with an outside travel agency, Lockheed also found very little difference between the proposals. Because of the lack of difference between both the in-plant as well as full agency proposals, Lockheed must take strong objection to the position being taken by various supporters of H.R. 2053 that the traveling public need not fear the granting of a monopoly to the travel agents because at present, by virtue of numbers alone, there is and always will be real and adequate competition between travel agents.

The goal of the second study initiated by Lockheed was to examine travel office automation as well as direct discounts from the airlines.

The second study group pursued direct discounting with both a travel agent and airlines. At that time the only travel agent who was openly offering discounts was threatened with loss of his plates because he was in breach of his agency agreement. Because of uncertainty of discounts through agents, Lockheed very quickly turned directly to the airlines. Over a period of approximately one year, Lockheed contacted nine major airlines relative to a business arrangement on a commission basis or volume discounts. All nine carriers which were contacted were extremely interested in the economic analysis prepared by Lockheed to justifying its argument that airlines could reduce their commission cost if they were to enter into a direct business relationship with the BTD. Although the airlines recognized the economic advantage to both parties by virtue of such a business arrangement, the fear of travel agency reprisals became an overriding consideration. As a consequence, the typical response Lockheed received was that "We will be Number 2, but not Number 1". Because Lockheed could not persuade any airline to become No. 1, statements made by ARTA and others before the Senate Committee that companies such as Lockheed are currently receiving airline discounts is not factually accurate.

To Lockheed's best knowledge, as of the date of this hearing there are no direct discount arrangements between BTD and the airlines. To the extent BTDs are receiving compensation, it is in the form of a commission such as that currently being received by Lockheed via the inplant relationship it established with a travel agency. This relationship came into existence in mid-1983 when the second Lockheed study group concluded that it would not be able to establish a direct relationship with an air carrier contrary to what was stated as an accomplished fact in the Yoder decision.

An issue that is invariably raised by the proponents of the pending legislation is the lack of agency relationship between the BTD and the airlines. Absent this relationship, it is contented that there can be no compensation for the services being rendered by the BTD. Perhaps the best answer to that issue is that the airlines are prepared to pay a 10% commission for every ticket sold. If that ticket is sold through a travel agent, the agent receives the 10% commission plus at times override commission based on volume. Notwithstanding the airlines' willingness to pay the 10% commission, the travel agents have taken the position that if ticketing and reservations services are performed by the BTD these services are not compensable. It therefore seems reasonable to conclude that the association's goal is to drive the BTD out of business by forcing companies who are trying to reduce their travel and administrative costs to move their travel business to the ASTA member agents. Should that objective be realized, the already much beleaguered airlines will suffer, in that at present the authorized reimbursement to the BTD has been set at 3% as opposed to the 10% full agency commission.

While many airlines face tough economic times, some even going bankrupt, the number of travel agency locations continues to rise from only 6700 in 1970 to over 22,000 in 1983. As more new travel agencies join the ranks of those already in the business, one might surmise that one way the travel agents hope to keep their agencies healthy from a financial point of view is to force all BTD out of business, thereby shifting the BTD travel business to the ASTA member. However, statistics contained in the ASTA testimony presented at the Senate hearing indicate that 45% percent of the U.S. travel agents book less than $2 million annually, which figure is below the level of business being performed by many BTDs. Hence, ASTA's apparent concern for small minority and female-owned travel agents as the basis for enacting H.R. 2053 is not meritorious. It is industry's contention that the real beneficiaries of the proposed legislation will not be the small agencies, but rather it will be a select group of large travel agencies that have established their own business travel departments. Since most business travelers establish their own travel plans, there really is no business development as is the alleged purpose of the travel agent. Thus, the travel agency with a business travel department becomes no more than an order taker on what must be a very highly profitable business.

In closing, Lockheed, for business as well as national security reasons, finds it necessary to maintain a BTD. The expense of operating its BTD is currently allocated to all Lockheed contracts. Given the constant pressure from government customers that fund work at Lockheed, it must constantly seek means to lower its cost of airline travel and to, at the same time, seek reimbursement for the services being rendered by its six BTD employees.

Lockheed's account, if we were forced to give up our BTD, would be so large as to preclude its handling by a small travel agency which is supposed to be benefitted by the legislation in question. Hence the beneficiary, if H.R. 2053 is passed, will be a select group of travel agents who have business travel departments, as opposed to the small and minority-owned travel agencies. The other alternative is for the BTD to buy direct from the airlines without benefit of a commission and at the full retail rate. Those higher costs would have to be passed on to the Government as our prime customer.

Finally, Lockheed must again emphasize that it has not been able to obtain direct discount from any airline and must, therefore, take exception to both Judge Yoder's statements as well as to those made by the supporters of H.R. 2053 that industry has already achieved its objectives relative to direct discounts from the airlines.

Today 60% of the airlines' business is handled by agents as opposed to only 38% in 1978. H.R. 2503 will only increase the agent's power over the airlines by increasing the agents' business base if they are successful in their efforts to force BTD to shift their business to travel agencies. To avoid that concentration of power and to give industry an opportunity to work with the airlines to reduce their cost of ticketing and reservation services, Lockheed urges that you not enact H.R. 2053.

I would now like to give the floor to Mr. John Bacon of Tenneco who will describe industry's perception of the potential impact of the CAB decision on the small travel agent. He will talk about why we in industry do not share the gloom and doom prophecies being put forth by the travel agent association.
In fact, Lockheed fully supports the small travel agency because we feel that small agencies make an important contribution to the air travel industry.

Bruce P. Ebert
October 19, 1983

Mr. MINETA. Please proceed.

TESTIMONY OF ARLENE MACCHIA, PRESIDENT, NATIONAL PASSENGER TRAFFIC ASSOCIATION, ACCOMPANIED BY JOHN BACON, TENNECO, INC.; RICHARD STEIN, NPTA COUNSEL; BRUCE EBERT, LOCKHEED-CALIFORNIA CO.; TIM HALL, ITT QUME; AND BRUCE EBERT AND JIM GAINES, LOCKHEED-CALIFORNIA CO.

Ms. MACCHIA. Good morning, Mr. Chairman.

Mr. Chairman and members of the subcommittee, I am honored to have the opportunity to appear before you to discuss the competitive marketing of airline tickets. As president of the National Passenger Traffic Association [NPTA], I want to express our strong opposition to H.R. 2053, a bill which would stifle competition in the sale of airline tickets and confer permanent antitrust immunity to travel agents.

Accompanying me today are John Bacon from Tenneco, Inc., in Houston, Tex.; Tim Hall from ITT QUME in San Jose, Calif.; NPTA Counsel Richard Stein; and Bruce Ebert and Jim Gaines from the Lockheed-California Co. Each will discuss aspects of the competitive marketing including how a business travel department operates, the benefits of competition, why airlines don't give discounts to large corporations, the impact of the CAB decision on small business and accountability for higher quality travel agencies including interlining.

NPTA is in association of the in-house business travel departments, more commonly known as BTD's, of nearly 600 corporations, hospitals, educational institutions, and government agencies ranging from Boy Scouts of America and the Muscular Dystrophy Association to Hughes Aircraft and the Washington Post. NPTA also has 20 regional affiliates, which have another 850 corporate members.

Since business travelers are responsible for more than $19 billion in business travel annually—more than half of all air travel—we are naturally interested in promoting the most efficient and responsive system of marketing airline tickets. As advocates of competition in this area, we have been involved with the Civil Aeronautics Board's competitive marketing investigation since its inception. Efforts to overturn the CAB's decisions are very disturbing to us.

For over 40 years the airline industry was one of the most heavily regulated businesses in our country. This has effectively foreclosed the use of a vast array of alternative market outlets including business travel departments, discount ticket officers, part-time distributors as well as many banks, credit card companies and firms yet to be identified.

The CAB examined the existing market and found it to be lacking in meaningful incentives for innovation and competition because the airlines were forced to pay travel agents a commission regardless of the level of service. This following directly from the fact that travel agents have a monopoly on access to the ticketing market. As it turned out there has been a 43-percent escalation in commission rates since 1978, while other airline operating costs have risen at a much slower rate.

The opportunity for other associations such as business travel departments, retailers, banks, and other firms to offer more attractive and less costly ticket distribution would benefit all travelers. The accreditation travel agencies, which is a protected environment, increased in number to over 22,000, would be rewarded for innovation. The ones that provide high quality service will thrive in the competitive environment. This is the American way of doing business. Offering consumers the best service at the least cost.

H.R. 2053 would foreclose such competition by granting travel agents permanent antitrust immunity and the exclusive right to be paid a commission for distributing airline tickets. In the past when airlines have tried to exercise marketing creativity they have experienced travel agent reprisal in the form of threatened or actual boycott. Such retaliation is possible because immunity from antitrust laws permit such anticompetitive actions.

In February 1980 the CAB withdraw the 7-percent fixed commission and ordered airlines to make individual plans to compensate agents. United Airlines was the first to respond, coming in with a proposal to pay a flat $8.50 per ticket transaction. That proposal generated so much opposition from travel agents that United quickly withdrew it and replaced it with a sliding scale of payment ranging from $7.50 to $37.50 depending on the distance flown.

Despite its policy United was not left unscathed by its innovation. In March the airline showed a 14-percent drop in traffic. At that time Newsweek magazine reported one San Francisco agent saying that she redirected 30 percent of her United business to other airlines. Even the president of a large travel agent organization said when he heard about American Airlines' recent proposal to drop commissions from 10 to 9 percent that his agency would have to look very carefully at its American Airlines sales and decide whether or not it should continue with that kind of productivity.

Our written statement contains additional examples. Mr. Chairman, our panel will now address misconceptions that have been presented by the supporters of the bill. The misconception that small travel agencies will be forced out of business, the misconception that corporations now get discounts from the airlines, the misconceptions that interlining, ASP, common accreditation system will all be disintegrated.

The misconceptions that passengers will have to carry their bags from one airline to the other. The misconception that unqualified individuals will be given blank ticket stock by the airlines. NPTS urges this committee to reject this legislation and to allow the CAB decision to become fully effective next year.

Please permit me to now introduce Tim Hall, business travel manager for ITT QUME in California, who will provide a brief description of how business travel is currently being managed.

Mr. Hall. Thank you, Arlene.

Mr. Chairman and members of the subcommittee, business travel departments or BTD's play an increasingly important role in the current ticket marketing environment as well as the market envisioned by the CAB. We hope by our testimony today to explain, based on our own experiences, what a BTD is, how it operates, and what services it provides to airlines.

I feel particularly well qualified to discuss the role of BTD's in a competitive environment because I have worked for an airline, a travel agency, and a corporate business travel department.

As you are aware from previous testimony, business travelers account for $19 billion in travel expenditures annually—more than half of all air travel. In many companies, business travel is the second largest expense next to salaries. All organizations engaging in substantial amounts of travel, regardless of their size, must find ways of managing it in the most cost effective and efficient manner. In general, there are three basic options available for doing this: One, in-house, two, in-plant, or three, through the use of an outside travel agency.

I would like to discuss each briefly, drawing on my own knowledge of corporate travel management.

An in-house or business travel department is responsible for arranging all of the organization's travel. The BTD generally is located on the premises of the organization and is not officially connected with any outside travel agency. As a result, the parent organization must bear the entire cost of the operation—a cost which is often quite substantial. The size and responsibilities of in-house travel departments vary greatly, depending on volume and travel patterns. Typically, in-house BTD's make reservations, deal directly with airlines, interact with airline computers, write tickets, and perform nearly all of the functions normally associated with travel agents.

Despite the operating costs associated with in-house BTD's, they provide several advantages that make them attractive to many organizations.

One, the BTD can assure conformance to company travel policy and enables the company to stay on top of changes in the travel industry. In most cases, the BTD is the major contributor in formulating and updating corporate travel policy.

Two, having a centralized department to collect data helps travel managers negotiate bulk-travel arrangements with suppliers in an orderly fashion.

Three, BTD employees can work to eliminate abuse by alerting management of unauthorized downgrading of tickets, abuse of travel expense accounts, and other violations of company travel policies.

Four, BTD employees become air fare specialists in the markets in which their company travels. BTD's exist because they can provide good service, at reduced costs.

Five, a BTD serves its company exclusively. This can be a big advantage over a travel agency that is busy with other corporate clients as well as personal travelers.

Six, through research and analysis, travel department personnel can determine reasonable per diem rates, thereby establishing specific rates for different destinations.

Seven, an outside travel agency is not in a position to deny travelers' extraordinary requests. The BTD personnel, with support from management, can monitor such request and insure that they conform to established policy.

Eight, in-house control provides a greater opportunity to provide confidentiality of travel plans when the company finds it desirable.

Yet, the business travel department, since it has been excluded from the Air Traffic Conference, cannot be paid at all for its work by earning commissions from the airlines. This is, in my experience, the major reason why many BTD's have converted their travel operations to what is known as in-plants.

An in-plant BTD agreement involves a written contract between a corporation and a travel agency which, in effect, allows the travel agency to set up a branch office on the premises of the corporation. Commissions earned from airline carriers are shared between the two parties, subject to guidelines established by the Air Traffic Conference. Generally, travel agents receive about a 3-percent commission on domestic travel from the airlines, of which about 75 to 80 percent is passed on to the company travel department as its share. The travel agent keeps the balance for allowing the in-plant BTD to use its name, or plate, to purchase tickets. An in-plant travel department can be staffed with corporate employees, personnel provided by the agency, or a combination of both. Most often, however, the BTD is run exclusively by corporate employees.

The services provided by such an in-plant BTD are fundamentally identical to those provided by travel agents, including the making of reservations, interlining, interacting with airline computers, and writing tickets. In-plants are, in effect, the functional equivalent of most travel agencies.

Many of the advanages of an in-plant arrangement are identical to those of the in-house BTD, with some important additional benefits:

One, companies, through the shared commission agreement, receive reimbursement for operational expenditures;

Two, backup personnel from the partner agency are available to supplement staff due to vacations, high travel periods, et cetera; and,

Three, depending on the agency, extra services, such as management reports, negotiated hotel rates, et cetera, are available.

Outside travel agencies—those corporations that do not find it cost effective to manage their own travel must turn to an outside travel agency. This method involves the lowest direct cost to the corporation, but the highest direct cost to airlines.

A corporation with this arrangement usually identifies its own air travel needs but, since it cannot become accredited as an authorized agent, it must operate through an existing travel agency. Although business directed to agents is nondiscretionary, travel agents still receive the same 10-percent commission from the airlines.

A company bears no direct costs since it does not have to set up a full-scale travel department, but it does lose a degree of control over its own travel planning. For this reason, an increasing number of companies have at least one individual who acts as a coordinator between the agency and the business traveler monitoring the company's travel and assisting in the formulation of travel policies. Yet the majority of corporations and other organizations have been relying, and will continue to rely, on outside agencies. For them, the advantages of in-house capabilities simply do not outweigh the costs involved.

To further illustrate the real differences between these options and their impact on the airlines, travel agents, and BTD's, let us use as an example the case of making my own travel arrangements to Washington, D.C.

If my corporation had an in-house BTD, I would have made my airline reservations through our own airline reservation computer, printed the ticket, packaged it, and been on my way. To accomplish this, I would have viewed my flight selections, checked the fares, and selected the flights that best fit my schedule, while providing the lowest fare. I would have made my own hotel and car reservations. In effect, I would have done all the work in preparing my itinerary, obviating the need for a travel agent. But my company would have received no compensation from the airlines. Since no travel agent was involved, the airlines would not have had to compensate a travel agent, either.

Now, let us look at what would have happened if my firm operated an in-plant travel department. On my ticket to Washington, approximately $500 round trip, a commission of $15—3 percent—would be paid to the travel agency, not including any overrides the airline might pay. My company would receive about $11.25 of the $15.00 from the agent.

This may not seem like a large cut of a $500 ticket, but the cumulative sum of such commissions can be staggering. For example, in a company with a $20 million annual travel account, not unusual in large firms, the travel agency working under an in-plant partnership arrangement would receive about a $200,000 share per year for doing little or no work.

I might add that had a travel agency servicing this account identically but as an outside agency their 10-percent commission would net them a staggering $2 million a year. Travel agencies in establishing an in-plant BTD agreement are merely conduits for travel arrangements; their work is done when the initial paperwork is complete and the ATC and IATA appointments are granted. They continue to share, however, in the commission split for years after those appointments are received.

There are now approximately 500 in-plant BTD's in operation and at least that many travel agencies that have profit-sharing relationships with them.

Finally, using my flight to Washington, as an illustration, if my company had operated through a full service arrangement, I would probably have researched my travel needs in advance and then called an agency, told them which flight I wanted and which hotel and car rental I needed. They would have made the reservations, printed the ticket and confirmed and delivered the package to my office. The travel agency would have received the full 10-percent commission plus any overrides on the commission. My firm would have received nothing.

I hope that this information I have brought you today of the role of the business travel departments and their relationships to travel agents has been helpful to you and will assist you weighing the legislative proposals before you.

Let me now introduce Bruce Ebert.

Mr. EBERT. Thank you, Tim.

Mr. Chairman and members of the subcommittee, thank you for the opportunity to appear before you. My name is Bruce P. Ebert. I am on the legal staff of the Lockheed-California Co. Also sitting on the panel is Mr. Jim Gaines, a staff attorney at Lockheed.

I want to express Lockheed's strong opposition to H.R. 2053, in that if it is enacted we foresee that commissions on airline tickets that Lockheed has been receiving during the past year for the in-plant business travel services being provided by Lockheed could again be denied. Should this occur, Lockheed might be forced to forego airline ticket commissions at a time when Lockheed, as well as many other Government prime contractors, are under ever increasing pressure to reduce their cost of doing business with the Government.

Because of the threatened loss of reimbursement, Lockheed was asked to testify in this matter because its experience over the past two years refutes statements contained in the Yoder decision as well as statements recently made by the president of the Association of Retail Travel Agents [ARTA] and others before the Senate subcommittee on S. 764. Their statements indicate that industry has established direct relationships with carriers for the purpose of obtaining discounts. These statements, while simply put, are not correct.

Approximately 2 years ago, Lockheed-California Co. initiated two studies relative to cost reduction/improvements in its Business Travel Department. The Lockheed-California Co. BTD, at the time these studies were initiated, had been in existence for approximately 32 years and was operating with an annual travel budget of approximately $9 million. To place this volume of business requires six full-time employees. It should also be noted that the total volume of travel business generated by all Lockheed companies is in excess of $40 million.

The first study initiated by Lockheed had two purposes. One such purpose was to evaluate the feasibility of closing the Lockheed-California Co. BTD as a cost economy move and to have all travel services provided by an outside travel agency. The second aspect of the first study was to ascertain the feasibility of cost reduction through an in-plant arrangement made possible by the CAB's decision in the Transmark case.

The first Lockheed study group evaluated 16-plus travel agency proposals, of which only four of the proposals were found to be acceptable. The unacceptable proposals were from travel agencies which were deemed to have insufficient staff or resources to handle the volume of business which would have been generated by the Lockheed account. The high rejection rate based on inadequate resources is not surprising, in that as stated in ARTA testimony before the Senate committee, approximately 95 of this Nation's travel agencies have annual bookings of less than $5 million per year.

With regard to the four acceptable proposals, Lockheed found that all four offers were virtually identical in terms of the services offered. In essence, there were no competitive differences between the four acceptable proposals and, hence, Lockheed does not agree that today there is real and effective competition between travel agents.

The goal of the second study initiated by Lockheed was to examine travel office automation as well as direct discounts from the airlines.

The second study group pursued direct discounting with both a travel agent and airlines. At that time the only travel agent who was openly offering discounts was threatened with loss of his plates because he was in breach of his agency agreement. Because of uncertainty of discounts through agents, Lockheed very quickly turned directly to the airlines.

Over a period of approximately 1 year, Lockheed contacted nine major airlines relative to a business arrangement on a commission basis or volume discounts. All nine carriers which were contacted were extremely interested in the economic analysis prepared by Lockheed to justifying its argument that airlines could reduce their commission cost if they were to enter into a direct business relationship with the BTD.

Although the airlines recognized the economic advantage to both parties by virtue of such a business arrangement, the fear of travel agency reprisals became an overriding consideration. We found that no airline was willing to be first, thereby running the risk of being traded away by the travel agents. As a consequence, the typical response received by Lockheed was that we would be No. 2 but not No. 1. To Lockheed's best knowledge, as of the date of this hearing there are no direct discount arrangements betwen a BTD and the airlines.

To the extent that BTD's are receiving commissions, it is in the form of a commission such as that currently being received by Lockheed by an inplant relationship established with a travel agency. This relationship came into existence in mid-1983 when the second study group concluded that it would not be able to establish a direct relationship with an air carrier contrary to what was stated as an accomplished fact in the Yoder decision.

An issue that is invariably raised by the proponents of the pending legislation is the lack of agency relationship between the BTD and the airlines. Absent this relationship, it is contended that there can be no compensation for the services being rendered by the BTD. Perhaps the best answer to that issue is that the airlines are prepared to pay a 10-percent commission for every ticket sold. If that ticket is sold through a travel agent, the agent receives the 10-percent commission plus at times override commission based on volume.

Notwithstanding the airlines' willingness to pay the 10-percent commission, the travel agents have taken the position that if ticketing and reservations services are performed by the BTD these services are not compensable. It therefore seems reasonable to conclude that the association's goal is to drive the BTD out of business by forcing companies who are trying to reduce their travel and administrative costs to move their travel business to the ASTA member agents. Should that objective be realized, the already much beleaguered airlines will suffer, in that at present the authorized reimbursement to the BTD has been set at 3 percent as opposed to the 10-percent full agency commision.

In closing, Lockheed, for business as well as national security reasons, finds it necessary to maintain a BTD. The expense of operating its BTD is currently allocated to all Lockheed contracts. Given the constant pressure from Government customers that fund work at Lockheed, it must constantly seek means to lower its cost of airline travel and, too, at the same time, seek reimbursement for the services being rendered by its six BTD employees.

Lockheed's account if we were forced to give up our BTD, would be so large as to preclude its handling by a small travel agency which is supposed to be benefited by the legislation in question. Hence, we believe the beneficiary, if H.R. 2053 is passed, will be a select group of travel agents who have business travel departments, as opposed to the small and minority-owned travel agencies. The other alternative is for the BTD to buy direct from the airlines without benefit of a commission and at the full retail rate. Those higher costs would have to be passed on to the Government as our prime customer.

Finally, Lockheed must again emphasize that it has not been able to obtain direct discount from any airline and must, therefore, take exception to both Judge Yoder's statements as well as to those statements made by the supporters of H.R. 2053 that industry has already achieved its objectives relative to direct discounts from the airlines.

I would now like to give the floor to Mr. John Bacon of Tenneco. He will describe industry's perception of the potential impact of the CAB decision on the small travel agent. He will talk about why we in industry do not share the gloom and doom prophecies being put forth by the travel agent association.

Thank you.

Mr. MINETA. Mr. Bacon?

Mr. BACON. Mr. Chairman, members of the subcommittee, thank you for the opportunity to speak in opposition to H.R. 2053. My intent is to address several of the misconceptions that have been made during these hearings which imply that competition in marketing will lead to the wholesale collapse of the air transport system.

These charges are false. It will not cause the chaos and disruption to service predicted. I would like to take a few minutes to tell you why. If NPTA believed efficiency of air transportation would be underlined, we would not be opposing H.R. 2053. Business travelers, our customers, rely more than any single group on efficient and dependable air transportation. If the system were to fail, fall apart tomorrow, become more costly or less efficient, we would be the ones to suffer most. We obviously don't believe this will happen.

CAB did not believe it would happen, either. It has been charged that competition in ticket distribution will drive hundreds of small travel agents out of business. There is no basis in fact for this claim. Travel agents provide a valuable service to airlines, to the discretionary traveler and the majority of the business community. As long as agents serve the airlines and their clients effectively, they will continue to thrive. In fact, the impact on travel agents due to participation of BTD's or other distributors is likely to be minimal.

If airlines decide to appoint business travel departments as ticketing agent, the impact will be felt not by the smaller but by the larger agencies. It is important to note most do not find it cost effective to set up business travel departments. Most medium or small businesses probably will not establish a BTD. A 1978 study found that 20 percent of the travel agents which handled business accounts dealt exclusively with large organizations.

It is this limited group of large agencies who might be affected by competition from BTD's. The small agents will not be affected at all. The American Society of Travel Agent's testimony before the CAB established that BTD sales will increase by only $250 million above prederegulation levels. As a fraction of the total $19 billion in business travel, that represents only 1.3 percent shift. This assumes that all the 1.3 percent would come from sales previously handled by agents.

The claim that small travel agencies would be displaced by BTD's is factually unfounded. Additionally taking into account impact of all potential new distributors, ASTA predicted, the travel agency total market share would drop from 53 to 51 percent, only a 2-percent loss in agency sales. It has been predicted airlines will abandon the common accreditation system if competition is allowed. On the one hand opponents of competitive marketing argue nonaccreditation is both efficient, and desirable to airlines, agents, and customers.

At the same time they argue and suggest the system is so fragile that it will collapse with the introduction of competition and that carriers will be willing to abandon it. This is both inconsistent and illogical. Air carriers have every incentive to maintain high standards. Ticket distribution is vital to their business.

Opponents of the CAB decision have also said that airline tickets will be sold by persons who will not know what they are doing. Gas station attendants, bartenders, or the butcher, baker, and the candlestick maker. This is totally absurd. There is absolutely no reason why airlines would ever allow this. Ticket stock is like a blank check. It would be foolhardy to hand it over to an incompetent distributor.

Airlines have a legal responsibility to provide air transportation or refund the ticket. Carriers are financially responsible for any tickets that are written which connect to another air carrier. Airlines will certainly insist on high standards for all of their distributors. It has also been suggested that without antitrust immunity carriers would abandon their practice of using interline agreements for travel involving more than one airline thereby forcing travelers into the grim task of carrying their luggage from airline to airline.

This is ridiculous. Interline agreements prevent one airline to provide air transportation on other airlines that are parties to the agreement. When one carrier writes a ticket involving the other, the first carrier is responsible for any loss. Carriers will certainly continue to make such cooperative arrangements in a competitive environment. In fact, the CAB could find only one airline that said it would seriously consider withdrawing from the conference if antitrust immunity were removed.

In conclusion, Mr. Chairman, H.R. 2053 has enormous implications for the marketing of airline tickets in this country. It turns back the clock on everything the CAB and Congress has done to allow competition in airline ticketing and in the airline industry. Indeed it would take us back to exclusive access, antitrust protection and restrictive ticketing systems. The time has come to eliminate travel agency exclusivity and give airlines the freedom to market tickets as they see fit without the intervening hand of Government.

Evidence on the record supports this decision. H.R. 2053 will not only give travel agents back their monopoly but will make antitrust immunity permanent. The ASTA urges Congress to reject H.R. 2053 which would reverse the CAB's decision and deny the public the many benefits of competition. Let us allow the free market to work so that both customers and airlines can obtain the best value at the lowest cost.

Thank you very much, and we would be glad to answer questions from the committee.

Mr. MINETA. Are there any further statements, Mr. Stein?

Mr. STEIN. No, no further statements, Mr. Chairman.

Mr. MINETA. Ms. Macchia, do you have any further statements?

Ms. MACCHIA. No, I do not, Mr. Chairman.

Mr. MINETA. Very well.

Let me ask, Ms. Macchia, do you think that any of the ATC rules on how agents do business are preventing innovations which could help consumers? If so, could you describe the rules and types of innovations that they are preventing?

Ms. MACCHIA. Yes, I do, Mr. Chairman. At present, there is no competition for the travel agencies, as every ticket that is issued, whether it be through an airline or travel agency or BTD has a guaranteed 10 percent commission. The airlines are afraid to be the first one to take a stand, so as a result in a corporate travel department that is issuing tickets, there are no special discounts, special fares, they are not given any kind of consideration as the consumer is not. I think that if the airlines were not bound by fear of the travel agency community and their lobbying effect that has been presently going on, you would see maybe discounts for consumers if they bypass the travel agency and dealt directly with an airline. They might get a ticket at a net fare.

I think that if you are not booking hotels, the ticket might have a different commission structure on it. I think to get a 10-percent commission built in on every ticket plus the override prevents any kind of sales incentive for the travel agencies to come up with any kind of different method of innovation.

Mr. STEIN. Mr. Chairman, if I may, in connection with your query, I think one of the most destructive rules is the 80-20 rule and the common control rule. That eliminates business travel departments from entry into the accreditation system. It is the 80-20 rule and common control rule which sets the flaw for commissions. If BTD's were permitted to participate in the common accreditation, they could function for far less money at far less expense to the airlines, and that of necessity has to be passed on to the consumer.

I think it is the 80-20 rule that should be addressed. This is an artificial number. No one knows where it was selected or how it came to pass or what it means. And I think are the two ingredients that ostracize BTD's and keep the costs of ticket distribution at the higher level.

Mr. MINETA. But that 80-20 rule is not just one that applies in the travel business. There are limitations in law in other fields as well that prevent agencies from just writing things on their own account. My own background is insurance brokerage. The law in the State of California, for instance, would say something like that no more than 30 percent, or 25 or 30 percent—I have forgotten now what the percentage is—of the total business that would be written by a specific agency cannot be written on business that they control. So that that way, you prevent a Lockheed from setting up their own insurance agency to write their own insurance.

Mr. STEIN. I think that the difference is that that type of regulation that you are describing is one to prevent increased costs to the issuer. In this particular case, if it were permitted, it would permit the vendor or the issuer to have decreased costs. I think there is a big difference between the legislation that you are describing which prevents self-dealing-type thing, as against here, where, here with self-dealing, we could do the same function as a travel agent does for far less compensation.

Mr. MINETA. For the benefit of the members, let me just inform everyone that the House is not going to go into the secret session as was contemplated at approximately 1 o'clock and that debate on the Boland-Zablocki-Wright amendment will start shortly. And the half hour on that rule will start, I imagine, in the next 10 minutes, and there will probably be a vote shortly thereafter.

I am sorry, Mr. Stein.

Mr. STEIN. I had concluded my remarks, but if you want I should be delighted to repeat them. I think the instance you cited is one which will prevent an increased cost to the issuer and prevent that type of abuse, whereas this type of inhibition is one that is so negative that what it does is it prevents a cost reduction. I think what we are discussing here and the heart of the issue, that is in the distribution of airline tickets we must find a way to reduce the cost to the airlines.

If and in the event we prevail and do find a way to reduce the costs to the airlines, that will be passed on to the consumer in various forms. One of the obvious ways to reduce the cost to the airlines is demonstrated by in-plant, where the business travel department does all the work that a travel agent does. All the work. Yet the compensation to the travel agent is only 3 percent, which is a far cry from the 10 percent that they would pay to the travel agent if it were routed through his house.

So here the business travel department is doing all the work, can do it on behalf of the airline and the travel agent is only paid 3 percent and he is pure insulation. He does absolutely nothing and participates in that 3 percent. I suggest to the chairman that the way to reduce the cost of distribution is of prime concern and one of the principal ways to overcome that and to contribute to it is to eliminate the 80-20 and common control rule which would permit BTD's to function. And cost the airlines far less money to distribute their product.

Mr. MINETA. Do BTD's write any tickets involving interline transportation and do you foresee any loss in the availability of interline transportation if the CAB decision is allowed to stand?

Mr. STEIN. Well, I think it is our first position that we don't think interlining will fall by the wayside. We can't imagine that that will take place. I mean we are writing interlining tickets at the moment. There is no question about it. We do the full service of writing of tickets that any travel agent does, and probably with more expertise because a BTD functions on behalf of his own entity and those where his plants are and knows where his warehouses are and knows the trips that his auditors take and engineers take and salesmen take and the marketing people and the executives take. If you concentrate in those areas, you probably are more effective and more efficient than any travel agent could possibly be.

Mr. MINETA. Now, it has been contended that without antitrust immunity airlines would be unwilling to have a common system of accreditation to insure that agents were honest, reliable, and competent. Do you agree with that statement?

Mr. STEIN. No; our information is totally different. Our information in talking with airlines is that they would welcome deregulation but they just can't afford to come up front and say something. I think it is very interesting to note that you have not had one airline testify in front of this body. I understand there will be one airline here today. It would appear to me that if the airlines were as concerned with the deregulated atmosphere, they would have appeared here and testified.

Mr. MINETA. Well, we had ATA or ATC I guess you might say.

Mr. STEIN. Well, I don't know that that is an airline.

Mr. MINETA. It is not an airline but it is an association of airlines. If ABA came to testify, I would take that as a position of the attorneys. ATA was here and I take that to be the position of the airlines.

Mr. STEIN. I think it is the position of that particular organization.

Mr. MINETA. What position would you take on legislation limited to antitrust immunity for common standards to insure financial responsibility and antitrust immunity for ASP?

Mr. STEIN. We agree there should be some common standards and also ASP. But we do not have any reason to believe that the 80–20 rule and common control rule serves any useful purpose except to perpetuate a monopoly for the travel agents.

Mr. MINETA. Ms. Macchia, in your testimony you indicate that although BTD's perform ticketing and distribution functions which otherwise would have to be performed by the airlines, the BTD can only be reimbursed for these services if it shares the reimbursement with an in-plant travel agent. I would appreciate the comments as to the percentage of compensation the in-plant travel agents ordinarily receive and what services are provided for this compensation.

Ms. MACCHIA. Yes, Mr. Chairman, and committee. We do exactly what a travel agency does. We issue tickets. We reserve cars. We book hotels. We take passport pictures. Visas, hotel, car reservations. I daresay in some cases I have been told by travel agencies that I have a much more indepth department than they do. We also are a car rental agency and by that I mean at our site we rent National, Hertz, Avis cars to the tune of maybe $45 a day. We do collect full commission on that. Everything that we do, we do through the airlines. But we are in-plant and we do have an in-plant agreement.

So that the compensation that we presently receive is 3 percent from the travel agency.

Mr. MINETA. Under the CAB's decision, would each individual airline be free to decide whether it wished to give commissions to a BTD and, if so, do you have any objection to this decision being left to each individual airline?

Ms. MACCHIA. Yes, the airlines would have that opportunity and they presently have that opportunity. But none have come forth. I do not have any problem with that.

Mr. MINETA. Now, if H.R. 2053 is not passed and the CAB's decision stands, would BTD's try to compete with agents in selling tickets to the general public, or would BTD's continue to limit themselves to ticketing for their parent company?

Ms. MACCHIA. I can basically speak for myself. And I know that I would not be competing with the general travel agency within our area. There are many locations that we have and California is one of them. We have two locations in California. We issue the tickets for one location. The other location I have recommended they use a travel agency. So that we would not be competing. I don't believe my company wants to get into the travel agency business. We would continue to do our operation exactly as we are doing it.

Mr. MINETA. Mr. Bacon?

Mr. BACON. I agree with what Ms. Macchia has said. Most of the large corporations are in certain entities of business. To my knowledge my company is not interested in getting into the travel business. I think it has been noted here that travel agencies are generally small businesses. I don't think Tenneco's return on investment would be significant enough for them to be wanting to get involved in the travel business.

Mr. MINETA. Mr. Hall.

Mr. HALL. I think I would have the same position, although ITT is a very diversified company, I don't believe they are interested right now of getting into the travel agency business and having travel agencies throughout the country. Certainly what my corporation is most interested in is being able to receive some compensation for the work that is performed by those people in the travel department. We are providing the same service as a travel agency. However, we are in overhead to the company even though we are providing a benefit and we can prove cost savings. If we were able to receive compensation in the airlines for doing their job, I think the corporation would be much more in favor of that.

Mr. MINETA. Mr. Ebert.

Mr. EBERT. Mr. Chairman, that question had been considered by Lockheed. It has been primarily discussed at what I would consider lower management level. We felt that there could be some advantages to looking at employee travel as being performed by the BTD's. But the ultimate decision on that has been put off for at least 1 year.

Mr. MINETA. Mr. Stein, let me ask about the prospects for litigation. If there was no antitrust immunity for the ATC agreements, would you anticipate that airlines and agents would be subject to a large number of antitrust suits if antitrust immunity were withdrawn, and how concerned should an individual travel agency be about the prospect of an antitrust suit?

Mr. STEIN. I believe that question was very adequately answered earlier this morning. We don't believe any antitrust suits of consequence could possibly be brought. I don't know that anyone is in a position to prevent the introduction of frivolous lawsuits. But I think once the pattern is established and once the case law is established, I don't believe that that is a threat.

Mr. MINETA. Let me ask the panel, if the CAB's decision stands, do you think it likely that there will be a new group of agents who will represent one or a few airlines? Do you foresee any problems for consumers in distinguishing agents who represent all airlines from agents who represent only a few airlines or one airline?

Ms. Macchia.

Ms. MACCHIA. I don't think the airlines will do that because I think they have lived for 40 years under the fear of one way to distribute their airline tickets. So I don't think that will happen concerning the airlines.

As far as the consumer having a problem, that might possibly be a problem to the consumer. However, I do think that the average travel agency will be doing the interlining and there will not be that much of a problem for the consumer.

Mr. MINETA. Any differences anywhere else? Mr. Ebert?

Mr. EBERT. No, I don't see substantial change. I think you are probably going to see business pretty much as usual. I think over a period of time you will gradually open it up to innovation, but I don't see that the traveling public will even be aware of that.

Mr. MINETA. Anything else? Mr. Wolf?

Mr. WOLF. No questions.

Mr. MINETA. Mr. Levitas?

Mr. LEVITAS. No questions.

Mr. MINETA. Mr. Vandergriff?

Mr. VANDERGRIFF. Mr. Chairman, I think in view of the extraordinary time constraints, I would like to defer to the author of the bill, Mr. Anderson, so that he can have an opportunity to ask questions.

Mr. MINETA. All right.

Mr. Anderson?

Mr. ANDERSON. Thank you, Mr. Chairman.

First, I just want to comment to Mr. Stein on I thought what was a very irresponsible statement a while ago when he said no airline had spoken here or had been represented here. We do represent organizations. Both the ATA and IATA have been well represented here, and their members, the airlines, have told me, and I am sure told others, that they are speaking for them.

The ATA and IATA consists of those organizations which you said were not represented here. You are just saying the same thing, that Ms. Macchia doesn't represent her people because they are not here. I assume she is representing the National Passenger

Traffic Association and that her members agree with what she has said. If I am wrong, then we should look at it differently.

But my feeling is you are well represented here with her as the representative of the NPTA. I hold the same respect for those people who came here representing IATA and ATA and other groups.

I think your off-the-board shot that no one was here representing them, I thought that was pretty irresponsible.

Ms. Macchia, isn't it true that conference rules do not prohibit BTD's from applying for accreditation as a traffic agent?

Ms. **Macchia**. Most of us are restrained by the 80-20 percent rule and location, so I could not become a travel agent.

Mr. **Anderson**. It is just that you don't want to sell tickets to the traveling public. For example——

Ms. **Macchia**. No, excuse me, that wasn't what I said. I said because of the conference rules, I do not comply——

Mr. **Anderson**. The 80-20, that is.

Ms. **Macchia**. It is more than that. Where we are located. We go through a security area, so the general public presently would not be able to get into my location. One of the things that we did consider when we had the big problem with in-plant was becoming a full agency and I was told that Allied would not comply.

Mr. **Anderson**. Could any member of the traveling public walk off the street into your office or one of these BTD offices and purchase an airline ticket from BTD's?

Ms. **Macchia**. I don't now about the other offices, but they cannot in mine, and my understanding is that they can't in most of them, so they are really not providing a service.

I cannot, if they walk in off the street. I can obtain an airline ticket for any of our executives who have passed the security guard. The problem we have is going past a security guard. If I wanted to issue tickets for the family of any of our employees, I have the same capabilities of a travel agency. But I would not receive any reimbursement. And I am not an approved travel agency.

Mr. **Anderson**. So you really aren't then providing a service to the general, to the traveling public.

Ms. **Macchia**. That is true.

Mr. **Anderson**. I just happened to read the statement the CAB had put out when they had their investigative report. They said:

> We conclude that notwithstanding NPTA's protestations, BTD's are not travel agents, and no change in the agency agreements could make them travel agents without violence to any intelligible understanding of the terms "travel agent" and "agent."

BTD's are in fact elements of the purchasing departments of large enterprises. They do not market or promote air transportation to the general public. Their primary loyalty is necessarily to their own companies and could not be shifted to the airlines from which they purchase air transportation.

Yet you know, if you could change these 80-20 and some of these other things, and you want to be able to receive the commissions other agents would be getting, I suppose then my concern is that if you do receive the additional commission, and it would be sizable because I am aware that you do purchase a tremendous percentage of the total air travel ticket, why then do you feel that if BTD's receive commission rates for reservations and ticketing service that the overall trend toward lower commissions would develop?

It would seem commissions would rise because airlines would have to make up that difference somewhere.

Ms. **Macchia**. I disagree with that. We are presently receiving 3-percent commission, as we presently stand.

Mr. **Anderson**. If you became a travel agent, you would receive what the rest would receive.

Ms. **Macchia**. No, we wouldn't have to do that because then the airline can negotiate.

Mr. **Anderson**. You would negotiate a lower rate than other travel agents now receive?

Ms. **Macchia**. It would depend on what the airline is proposing. There are some presently, World Airways as an example has a commission rate to BTD's of 10 percent. So it would vary depending upon the airline. But the airline would have the option of negotiating.

The in-plant contracts that we would all be asked to sign because of this last change in commission rates will require that the corporation sign a legal contract, binding them in a legal agreement with the travel agency.

Mr. **Anderson**. Are you telling us that if this bill were not to pass that you people then would sign agreements with the airlines to, and put a ceiling of say 3 percent to the BTD's and 10 percent to the others?

Ms. **Macchia**. No, Congressman Anderson. I don't know what would happen if the bill would not pass. I do know it would give the airlines the option of negotiating what they want and not feeling that they have to only have one area of distributing tickets.

Mr. **Anderson**. I heard earlier some of you saying, "We are not getting anything, any commissions or discounts." Are you telling us that no members of the NPTA have received any form of discount tickets or discounts from airlines?

Mr. **Gaines**. Congressman Anderson, may I address that.

There are a number of promotional type things which we enjoy as any other consumer enjoys, but as far as a direct relationship with an airline, specifically aimed at reducing cost of fares, we do not enjoy that nor are we aware of any major industry enjoying like privileges.

Mr. **Anderson**. I have talked to airlines, and they say they do give discounts in block purchases.

Mr. **Gaines**. Not that I am aware of and——

Mr. **Anderson**. What you are saying is no members of NPTA have received any form of discount tickets from airlines? I am not talking about promotions.

Mr. **Gaines**. No direct discounts is the terminology used, that is correct.

Mr. **Anderson**. None of them.

Mr. **Gaines**. Not that we are aware of.

Ms. **Macchia**. May I answer that?

Mr. **Anderson**. Sure.

Ms. **Macchia**. You might be referring to Southwest, AGM, a year and a half or 2 years ago came out with a book of airline tickets anyone could purchase if you bought them for *x* amount of dollars.

Mr. ANDERSON. A block of tickets, yes.

Ms. MACCHIA. That was Southwest Airlines. I don't know if they are still doing that. As far as any NBTA corporation I know of within our association getting any kind of special discount because of their volume, I know of none.

Mr. BACON. You could do the same thing as an individual with Southwest. That block purchase was not restricted to anybody. If you were an individual——

Mr. ANDERSON. It is not restricted, but you as an individual are not going to buy a block of tickets, but an individual representing Lockheed or some other big company can afford to go down and buy a block of tickets at discount. Don't say anybody can buy it because the average person can't afford to buy a block of tickets.

Mr. BACON. If I was flying between Dallas and Houston on an independent basis, I believe I could afford to go out and do that or going on an individual basis to visit Congressman Vandergriff, I could certainly afford to buy that block of tickets.

Mr. ANDERSON. If you were an individual doing as much traveling as a company like Lockheed that does that many times, where they could utilize a block of tickets, perhaps you could.

Mr. GAINES. Recognizing, Congressman, that in many instances some of those promotions are not in our routes we follow. Southwest is not an airline we utilize. Perhaps somebody else may be able to, but it is not, large corporations are usually following major routes cross-country and in those instances, we have not been offered the opportunity.

A major carrier has not done that. I am simply not familiar enough with the little small computers nor have we talked with them enough to insure you that indeed there may not be some local relationship that exists but not on a major scale.

Mr. ANDERSON. Isn't it a fact that in 1981 the CAB eliminated any practical legal restrictions on the ability of airlines to negotiate with BTD's and grant them such discounts as the airlines deemed prudent in recognition of their self ticketing services, volume of their purchases and for any other reasons?

Mr. GAINES. That is correct, phase five of the hearings.

Mr. ANDERSON. That is what you can do.

Mr. GAINES. You can do it if they would allow us to enjoy negotiations to accomplish it. They have not chosen to use phase five of the hearings as a means of reducing overall costs of operations.

Mr. EBERT. Congressman, I participated in some of the meetings with the airlines. While they were aware that they could do that, there isn't one airline, a major airline, that was willing to run the risk of travel agent reprisals. They simply turned us down flat. We had meeting after meeting. It spanned a year.

We say we have met with nine carriers. There were numerous meetings with some of those carriers. We met at our plant, we met at their corporate offices, we met with some of their top officials. The response was generally the same. We cannot afford the risk of travel agent reprisal.

Mr. GAINES. That phase five hearing has not come to fruition in any sense we are aware of.

There was also a clause that allowed the travel agency to also offer the same thing, with one stipulation, that they had to live with the administrative agreements they had with the carriers. There was quite a few travel agencies who intended to get into that business.

There was one gentleman down in Florida earlier mentioned who did it for a period of time and simply was requested to withdraw that or lose his place. They have not allowed a direct relationship with themselves or their agencies. We would certainly have enjoyed that type of proposal, but it did not happen.

Mr. ANDERSON. What will accreditation do for BTD's? Are you assuming airlines that won't pay you today will agree to pay you just because you then would be on the list of accredited agents?

Mr. GAINES. Not at all. They will make their own choices of those people they find can meet their individual principles and make their own decision, whether they want to enjoy a relationship or not. It simply says we are in the same position as other people to offer our services and that is what we do for them. Then we should be compensated in some like manner.

Mr. ANDERSON. Let's suppose that BTD's get the opportunity to accredit themselves as agents of the airlines. Assume that the airlines elect to keep the conference system despite the fact. Would that not produce an incentive for all corporate users to seek accreditation and what would they gain from doing so in view of the carriers' statements that they do not want to compensate their customers as agents? In other words, this could go on and on, so everybody could be an agent that has a business.

Mr. EBERT. Congressman, I don't believe that in fact would occur. The cost of running a BTD is not fully recoverable under our present system. So management must look at whether or not it is cost effective to add those additional bodies to run the BTD.

I don't think you are going to see every small manufacturing plant with its own travel agency. We chose to do it because we are doing about $9 million worth of business. We have security reasons. Those are overriding considerations. We cannot be serviced by the small agent.

But that same statement would not hold true for a lot of the small companies in our area. They would still continue to deal through their travel agents even if they were given the opportunity.

Mr. ANDERSON. Thank you, Mr. Chairman.

Mr. MINETA. Ms. Macchia, and Mr. Bacon, Mr. Hall, Mr. Ebert, Mr. Gaines, and Mr. Stein, thank you very much for your testimony and for your response to the inquiries of the members.

As you can tell, there is a great deal of interest. You have added to our understanding, and I appreciate it very much.

Ms. MACCHIA. Thank you.

Mr. MINETA. The subcommittee will stand adjourned until 2, at which time we will resume the hearings with the balance of the witnesses. The subcommittee stands in recess until 2 o'clock.

[Whereupon, at 12:50 p.m., the subcommittee was recessed until 2 p.m. the same day.]

Mr. MINETA. The subcommittee will reconvene. We would like to call forward a panel made up of William D. Toohey, vice chairman, Travel and Tourism Government Affairs Council, Mr. Willard R. Brown, vice president, Travel Agency Services, American Automobile Association, and Mr. Edwin M. Johnson, Jr., president, Travel Trust International.

The full text of your prepared statements will appear in the record at this point.

[Statements referred to follows:]

STATEMENT IN SUPPORT OF H.R. 2053, THE AIR TRAVELERS SECURITY ACT OF 1983, PRESENTED BY WILLIAM D. TOOHEY

Mr. Chairman, I am William D. Toohey, President of the Travel Industry Association of America (TIA) and Vice Chairman of the Travel and Tourism Government Affairs Council, an affiliate of TIA.

We would like to express our appreciation to the Subcommittee for providing us with this opportunity to present our views in support of H.R. 2053, the Air Traveler's Security Act of 1983.[1]

The Travel and Tourism Government Affairs Council is the national organization representing the unified travel industry viewpoint on legislative and regulatory issues of common concern. Council membership is comprised of 29 of the largest travel and tourism national trade organizations, reflecting the diverse nature of the industry which includes transportation, food services, accommodations, attractions, tour sales and travel agencies.

The travel industry is now the second largest retail industry in the United States, having generated (in 1982) $194 billion in receipts and $20 billion in federal, state and local tax revenues. It directly employs 4.5 million Americans at every level of skill and indirectly provides another 2.2 million supporting jobs. There are over one-half million U.S. businesses serving the traveler and paralleling the travel agent segment of our industry, nearly all are small businesses (as classified by the Small Business Administration).

While the decision rendered in the Civil Aeronautics Board's Competitive Marketing Investigation will vary in its impact on each industry component, it is clear that the implementation of any federal policy arising from this case will widely affect the industry as a whole.

The Council has concluded that the travel agency system offers important advantages to both the travel and tourism industry and the traveling consumer. We are justifiably concerned that, absent an equally effective distribution system, destruction of the agency system may result in serious adverse consequences for the public and the travel industry, including the potential economic dislocation of over 18,000 small businesses.

It is important to note that airlines depend on ATC-accredited travel agents for 60 percent of their domestic ticket sales and at least 75 percent of international ticket sales. The accreditation system provides airlines and many other segments of the travel industry with direct marketing and selling access to communities throughout the nation, including those remote from individual locations of industry facilities and airline route systems. This system, which is currently threatened by the CAB's decision, has very effectively met the consumer need for easy access to experienced travel advisors competent to counsel and inform travelers about travel and transportation options. Further, interline agreements and accompanying antitrust immunity, are an essential element of the consumer convenience the public has come to expect over the last 40 years.

In addition, we must question the Board's allegations that the agreements and accreditation standards at issue are anticompetitive. In 1982, for example, an average of five new agency locations were opened every day. Further, it should not be overlooked that airlines continue to retail their own tickets and negotiate bulk and reduced fares with a vast array of travel industry components including tour operators, cruise lines, hotels and resorts—rendering the very term "exclusivity" a misnomer. This will not change if Judge Yoder's decision is implemented.

In the final analysis, the intrinsic strength of the current system is the outgrowth of a high level of competition—the definitive foundation of a free market—united with minimal standards which guarantee objective, high quality service to the consumer.

It is for these reasons that the Travel and Tourism Government Affairs Council support H.R. 2053 "The Air Traveler's Security Act of 1983." Thank you.

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[1] The American Express Co., a member of the council, has no objection to the CAB's decision, and is therefore opposed to H.R. 2053.

THE TRAVEL AND TOURISM GOVERNMENT AFFAIRS COUNCIL

Air Transport Association;
American Automobile Association;
American Bus Association;
American Car Rental Association;
American Hotel and Motel Association;
American Recreation Coalition;
American Sightseeing International;
American Ski Federation;
American Society of Travel Agents;
Association of Retail Travel Agents;
Conference of National Park Concessioners;
Gray Line Sight-Seeing Association;
Highway Users Federation;
Hotel Sales Management Association International;
International Association of Amusement Parks and Attractions;
International Association of Convention and Visitor Bureaus;
National Air Carrier Association;
National Campground Owners Association;
National Caves Association;
National Council of Area and Regional Travel Organizations;
National Council of State Travel Directors;
National Council of Travel Attractions;
National Restaurant Association;
National Ski Areas Association;
National Tour Association;
Recreational Vehicle Industry Association;
Travel Industry Association of America;
United States Travel Data Center;
United States Tour Operators Association.

At-large members:

Richard T. Ashman, Holiday Inns, Inc.;
Charles Gillett, New York Convention and Visitors Bureau;
Howard James, The Sheraton Corporation;
Robert Juliano, Hotel Employees and Restaurant Employees International Union;
James Montgomery, Pan Am World Services, Inc.;
Hugh H. Smith, American Express Company.

TESTIMONY OF WILLARD R. BROWN, VICE PRESIDENT, TRAVEL AGENCY SERVICES, AMERICAN AUTOMOBILE ASSOCIATION

Mr. Chairman, I am Willard R. Brown, Vice President of Travel Agency Services for the American Automobile Association.

AAA is one of the largest travel organizations in the world, serving its 23,600,000 members through a network of more than 1,000 offices, with over 750 accredited travel agency locations.

AAA strongly supports H.R. 2053, "The Air Travelers Security Act."

Although AAA might very well be viewed as a major beneficiary of the collapse of the ATC and IATA travel agency programs, we feel that our responsibility is to the traveling public and our members who make up a large portion of that public. Therefore, we support the agency programs, their structure, and the rules as they existed prior to December 29, 1982. We believe that that system has most effectively served the public's needs, desires, and expectations for at least four major reasons. It has ensured: (1) Agent impartiality and objectivity; (2) a lack of consumer complaints in agent processing of air transportation; (3) consumer protection from agency defaults; and (4) consumer convenience.

I would like to elaborate briefly on each of these points:

AGENT IMPARTIALITY AND OBJECTIVITY

Under the current system, once an agent meets certain minimum standards involving financial fitness, bonding, personnel, and experience, the agent is appointed automatically by the various airline members of the Air Traffic Conference of America and usually by the International Air Transport Associaiton. The ATC and IATA comprise most of the world's scheduled airlines, consequently, the agent has the opportunity and responsibility to impartially represent all of these carriers. The accredited agent has no incentive to give biased information to the air traveler. An ATC appointed agent is able to provide a prospective passenger with the most objective and highest quality of information on fares, schedules, and types of service.

If after January 1, 1985, the current travel agency system begins to disintegrate and eventually evolves into a dealer or broker arrangement where travel agents would typically represent just a few airlines, objectivity would, without question, be seriously undermined and perhaps lost forever.

In short the public will be the big loser if the ATC agency program is seriously diluted or disappears altogether.

A LACK OF CONSUMER COMPLAINTS IN AGENT PROCESSING OF AIR TRANSPORTATION

The number of air travel complaints involving travel agents under the present system is remarkably low. For instance, according to official CAB reports for 1982 there were a total of 10,151 complaints; of those, only 113 (1.1 percent) were related to travel agents. In spite of the growing number of agency offices, the record is even better this year.

Out of 546 reservations and ticketing complaints in 1982, only 23 (4.2 percent) involved travel agents. Of 600 complaints on air fares, only 18 (3 percent) were attributable to travel agents. And concerning 1,084 refund complaints, only 31 (2.9 percent) related to agents. This is indeed a remarkable record since the over 21,000 accredited travel agents (the count now stands at nearly 22,500 and that's real competition) processed and issued 125 million documents on behalf of the scheduled airlines.

We believe this extraordinary record of service results at least in part from the fact that travel agents are required to meet minimal experience and financial standards before they are able to receive ATC accreditation. The number of agency locations coming into the stream is increasing at a consistent rate of approximately 100 per month and it is therefore unquestionably apparent that the minimal entry and retention standards of ATC and IATA represent absolutely no bar to the professional and rapid growth of this industry which is so effectively serving and protecting the public interest. In short, travel agents, by the farthest stretch of imagination, do not represent a monopoly.

CONSUMER PROTECTION FROM AGENCY DEFAULTS

The public has historically been protected from travel agent insolvency with respect to the sale of scheduled air transportation. Indeed, to the best of our knowledge, throughout the entire 40-year history of the Air Traffic Conference agency program, no airline ever refused to honor a ticket which had been validly issued by an accredited travel agent, regardless of the financial condition of that agency.

CONSUMER CONVENIENCE

Much of what air passengers take for granted as part of their air travel package is facilitated by air carrier agreements. For instance, it is through the ATC Area Settlement Plan and Airline Clearing House that such passenger conveniences as interlining are enhanced.

Interline agreements allow travel agents to use one standard ticket form when ticketing a passenger on several carriers involving trips with an unlimited number of segments. The passenger therefore is spared the inconvenience of having to acquire a separate ticket for each leg of an interline journey regardless of how many stopovers or connections are involved. Furthermore, interline agreements on ticketing are the reason one airline will accept another airline's traffic documents. For instance, if a passenger misses a flight or there is a delay, he can take his ticket to another airline and obtain transportation whenever both lines have, as most do, a working agreement.

At least one airline, USAir, has publicly stated that "The ATC travel agency program is the glue that binds the interline system together." [1] USAir also went on to say that "Without antitrust immunity, there is a serious risk of eroding and possibly destroying, the worldwide interline air transportation system." [1] If USAir or any other airline acts on this belief and withdraws from the Air Traffic Conference, the interlining system and agency programs which have served the public so well will be in serious jeopardy and are very likely to collapse. We believe Congress should not allow that possibility to occur.

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[1] Transcript of Oral Arguments on CMI, Sept. 16, 1982, at p. 94.

A moment ago I mentioned the experience and financial standards which are required under the ATC and IATA agency selection, appointment, and retention systems. If your subcommittee, Mr. Chairman, could review the changes in the ATC agency resolutions and the modifications which have occurred over the past decade to make them less anticompetitive and more effective in the public interest, and even more particularly, if it had been possible for you and your committee to be present at the various working group and task force meetings when these changes were developed, you would have additional and even more vivid evidence why there has been great merit behind the Civil Aeronautics Board's decision to grant the agreements in each individual case antitrust immunity. Without such shielding from the federal antitrust laws, Triple A and, I dare say, perhaps others would never have engaged in what were often adversarial discussions which resulted in a greatly improved service and a much finer product for the American public in air transportation.

CONCLUSION

In summary, although AAA is likely not to be greatly affected by the demise of the ATC and IATA travel agency programs, should such an occurrence take place, we do strongly believe that maintenance of the current system will continue to bring substantial benefits to the consumer just as it has over the past forty years.

We therefore urge you and your committee, Mr. Chairman, to favorably report the proposed legislation as soon as possible.

Thank you for allowing me to appear before you today to express AAA's views relative to the CAB's Competitive Marketing Investigation. I will be happy to try to respond to any questions which you may have at this time.

Mr. MINETA. Please proceed.

TESTIMONY OF WILLIAM D. TOOHEY, PRESIDENT, TRAVEL INDUSTRY ASSOCIATION OF AMERICA, AND VICE CHAIRMAN, TRAVEL AND TOURISM GOVERNMENT AFFAIRS COUNCIL; WILLARD R. BROWN, VICE PRESIDENT, TRAVEL AGENCY SERVICES, AMERICAN AUTOMOBILE ASSOCIATION; AND EDWIN M. JOHNSON, JR., PRESIDENT, TRAVEL TRUST INTERNATIONAL

Mr. MINETA. Gentlemen, we have your statements. They will all be made a part of the record.

Mr. Toohey, please go ahead and proceed in your own fashion.

Mr. TOOHEY. Mr. Chairman, I am William D. Toohey, president of the Travel Industry Association of America and vice chairman of the Travel and Tourism Government Affairs Council, an affiliate of TIA.

We would like to express our appreciation to the subcommittee for providing us with this opportunity to present our views in support of H.R. 2053, the Air Traveler's Security Act of 1983.

The Travel and Tourism Government Affairs Council is the national organization representing the unified travel industry viewpoint on legislative and regulatory issues of common concern. Council membership is comprised of 29 of the largest travel and tourism national trade organizations, reflecting the diverse nature of the industry which includes transportation, food services, accommodations, attractions, tour sales, and travel agencies.

The travel industry is now the second largest retail industry in the United States, having generated, in 1982, $194 billion in receipts and $20 billion in Federal, State, and local tax revenues. It directly employs 4.5 million Americans at every level of skill and indirectly provides another 2.2 million supporting jobs. There are over one-half million U.S. businesses serving the traveler and, paralleling the travel agent segment of our industry, nearly all are small businesses—as classified by the Small Business Administration.

While the decision rendered in the Civil Aeronautics Board's competitive marketing investigation will vary in its impact on each industry component, it is clear that the implementation of any Federal policy arising from this case will widely affect the industry as a whole.

The council has concluded that the travel agency system offers important advantages to both the travel and tourism industry and the traveling consumer. We are justifiably concerned that, absent an equally effective distribution system, destruction of the agency system may result in serious adverse consequences for the public and the travel industry, including the potential economic dislocation of over 18,000 small businesses.

It is important to note that airlines depend on ATC-accredited travel agents for 60 percent of their domestic ticket sales and at least 75 percent of international ticket sales. The accreditation system provides airlines and many other segments of the travel industry with direct marketing and selling access to communities throughout the Nation, including those remote from individual locations of industry facilities and airline route systems. This system, which is currently threatened by the CAB's decision, has very effectively met the consumer need for easy access to experienced travel advisers competent to counsel and inform travelers about travel and transportation options available to them. Further, interline agreements and accompanying antitrust immunity are an essential element of the consumer convenience the public has come to expect over the last 40 years.

In addition, we must question the Board's allegations that the agreements and accreditation standards at issue are anticompetitive. In 1982, for example, an average of five new agency locations were opened every day. It should not be overlooked that airlines continue to retail their own tickets and negotiate bulk and reduced fares with a vast array of travel industry components including tour operators, cruise lines, hotels, and resorts—rendering the very term "exclusivity" a misnomer. This will not change if Judge Yoder's decision is implemented.

In the final analysis, the intrinsic strength of the current system is the outgrowth of a high level of competition—the definitive foundation of a free market—united with minimal standards which guarantee objective, high quality service to the consumer.

It is for these reasons that the Travel and Tourism Government Affairs Council supports H.R. 2053 the Air Traveler's Security Act of 1983.

Thank you.

Mr. MINETA. Thank you very much, Mr. Toohey.

Mr. BROWN. Mr. Chairman, I am Willard R. Brown, vice president of Travel Agency Services for the American Automobile Association. We are very pleased to have this opportunity to appear before you and your committee today.

AAA is one of the largest travel organizations in the world, serving its 23,600,000 members through a network of more than 1,000 offices, with over 750 accredited travel agents.

AAA strongly supports H.R. 2053, the Air Travelers Security Act.

Although AAA might very well be viewed as a major beneficiary of the collapse of the ATC and IATA travel agency programs, we feel that our responsibility is to the traveling public and our members who make up a large portion of that public. Therefore, we support the agency programs, their structure, and the rules as they existed prior to December 29, 1982, and as they are likely to be amended in the future.

We believe that that system has most effectively served the public's needs, desires and expectations for at least four major reasons. It has insured:

One, agent impartiality and objectivity;

Two, a lack of consumer complaints in agent processing of air transportation;

Three, consumer protection from agency defaults; and

Four, consumer convenience.

I would like to elaborate briefly on each of these points.

With respect to agent impartiality and objectivity, under the current system, once an agent meets certain minimum standards involving financial fitness, bonding, personnel, and experience, the agent is appointed automatically by the various airline members of the Air Traffic Conference of America and usually by the International Air Transport Association. The ATC and IATA compromise most of the world's scheduled airlines, consequently, the agent has the opportunity and responsibility to impartially represent all of these carriers.

The accredited agent has no incentive to give biased information to the air traveler. An ATC-appointed agent is able to provide a prospective passenger with the most objective and highest quality of information on fares, schedules, and types of service.

If after January 1, 1985, the current travel agency system begins to disintegrate and eventually evolves into a dealer or broker arrangement where travel agents would typically represent just a few airlines, objectivity would, without question, be seriously undermined and perhaps lost forever.

In short, the public will be the big loser if the ATC agency program is seriously diluted or disappears altogether.

Regarding the lack of consumer complaints in agent processing of air transportation, the number of air travel complaints involving travel agents under the present system is remarkably low. For instance, according to official CAB reports for 1982, there were a total of 10,151 complaints; of those, only 113 or 1.1 percent were related to travel agents. In spite of the growing number of agency offices, the record is even better this year.

Mr. Chairman, if I might digress one moment from my prepared statement, I would like to mention that I have observed a paper which contains some comments of someone who is scheduled to follow me before you if I may. It addresses AAA's point before the Senate Subcommittee on Aviation. What it says by inference is that there is a high level of complaints against the travel agency industry, at least by what appears in the Better Business Bureau records. It indicates that travel agents ranked 37th or pretty high up that scale.

I would like to invite the committee's attention, Mr. Chairman, to the fact that probably, this covers the broad spectrum of travel agency services, far beyond air transportation, which is, of course, I suppose primarily at issue here today. It could involve hotels. It could involve cruises. It could involve tours and whatever, and it probably does. It also says we would not be a party to the area settlement agreement. That is an incorrect statement, Mr. Chairman. We will be a party to that agreement as long as it is in its present form and we are free to discuss that agreement as a third party under ATA's resolution 1.40 or IATA's resolution 802(c).

We are able to discuss these things and would never think of leaving the area settlement plan as our system as long as the system serves the public interest as we assume it does and feel that it does today. Going on with this complaint record, 113 out of 10,151.

There were 546 reservation complaints, reservations and ticketing complaints in 1982, only 23, or 4.2 percent, involved travel agents. Of 600 complaints on air fares, only 18, or 3 percent, were attributable to travel agents. Concerning 1,084 refund complaints, only 31, or 2.9 percent, related to agents. This is indeed a remarkable record since the over 21,000 accredited travel agents—the count now stands at nearly 22,500, and we submit, Mr. Chairman, that that is real competition out there.

I would again like to depart from my prepared statement just to point out to the committee, Mr. Chairman, that in this period that involved those 113 complaints, travel agents sold, handled, generated, more than $21,824,000 in airline sales, processed 125 million documents, involved 20,962 travel agents representing carriers. Out of the total, complaints of 10,151 only accounted for 1.11 percent of that total.

I think if one were to look at the progress that has been made in this entire area of avoiding complaints in the public interest over the period of 4 years preceding this, you would find that while travel agent sales increased 47 percent, while the documents increased 27.3 percent, the remarkable record stands at complaints against agents decreased 76.7 percent.

As for consumer convenience, much of what air passengers take for granted as part of their air travel package is facilitated by air carrier agreements. For instance, it is through the ATC area settlement plan and airline clearinghouse that such passenger conveniences as interlining are enhanced and, of course, we can see the impact of that more and more every day, as we look at the weekend financial conditions of some carriers.

Interline agreements allow travel agents to use one standard ticket form when ticketing a passenger on several carriers involving trips with an unlimited number of segments. The passenger, therefore, is spared the inconvenience of having to acquire a separate ticket for each leg of an interline journey regardless of how many stopovers or connections are involved.

For instance, if a passenger misses a flight, the tickets of that passenger, when there is space available, will be honored by others. On that point, Mr. Chairman, with respect to the interlining area, there has been some question out there as to really whether interlining would continue absent antitrust immunity. We believe it would be greatly diminished. I understand that just this last week, American Airlines has shifted from its multilateral agreement systems, moving more to bilateral agreements.

The question of course here from our point of view is we believe that as U.S. Air said, the ATC agency—U.S. Air indicated that, without antitrust immunity over the agreements, even though, and this was in their oral arguments of last fall, even though they support the agency program as the glue that binds the interline system together, they would very likely withdraw without antitrust immunity and if one does, an important carrier like U.S. Air, we submit the ATC travel agency program would collapse.

I will be glad, Mr. Chairman, not to burden you with too much here. A moment ago, I mentioned the experience in financial standards required under the ATC and IATA appointment and retention programs. If your subcommittee could review the changes in the ATC agency resolutions and modifications which have occurred over the past decade, modifications that have made them less anticompetitive and more effective in the public interest, and even more particularly, if it had been possible for you and your committee to be present at the various working group and task force meetings when these changes were developed, I dare say you probably would have, and I am sure you do have, a deep appreciation for the ability for all of us to put our input into the agency programs.

In summary, although AAA is likely not to be greatly affected by the demise of the ATC and IATA travel agency programs, should such an occurrence take place, we do strongly believe that maintenance of the current system will continue to bring substantial benefits to the consumer just as it has over the past 40 years.

We therefore urge you and your committee, Mr. Chairman, to favorably report out the proposed legislation as soon as possible.

I would like to add that, in AAA's view, exclusivity, whoever invented that term, used a very improper term. Exclusivity, as I am sure the chairman and committee know, pinned years ago on compensating travel agents for selling air transportation. AAA does not seek protection as a travel agent. Our job is to generate and to create traffic and thereby drive down the cost of air transportation to the public. When someone says that we are a monopoly or we are seeking protectionism, they are completely wrong. When they say there is no competition, they are wrong on that point.

This morning, economic regulation 1248 was brought out which allows the airlines to compensate through special fares such sellers as the National Passenger Traffic Association, business travel advisers, 22,433 agency locations as of September 30. That is competition. There were 165 airlines which have their own multiple sales outlets. That is competition. There are hundreds of business travel departments. There are other commercial firms which write their own airline tickets. There are thousands of other methods where the public can purchase and procure air transportation systems.

Our rather cursory survey has shown that altogether, there are in excess of 35,000 competitive outlets where people can come and by transportation.

Thank you very much, Mr. Chairman.

Mr. MINETA. Thank you very much, Mr. Brown.

Mr. Johnson.

Mr. JOHNSON. Yes, Mr. Chairman.

I appreciate the opportunity to be here on this panel today for a couple of reasons. One is that this is the first opportunity I have ever had to testify before a congressional committee. The second is that it occurs to me I am probably the only real live travel agent in these proceedings today. So I do appreciate this chance, this opportunity.

My name is Edwin H. Johnson, Jr., and I reside in Ridgewood, N.J. I am a principal owner and officer of a travel agency which consists of a headquarters office and two branches. In addition to retail/vacation travel, the agency is heavily engaged in the sale of air transportation to corporate travelers. My partner and I started the agency 15 years ago.

For the past 3 years, I have served on the board and as an officer of Travel Trust International, a consortium of 46 agencies throughout the United States, some of which are very large. TTI members generate in excess of $800 million annually in the sale of travel and related services. I currently serve as TTI's president, and am here to represent their views as well as my own.

For several years, I have been active in ASTA affairs, mostly at the New Jersey chapter level. I also serve on the National Automation Committee of ASTA. Although I support the ASTA position of many of the current issues, I am not here to represent their views.

I support H.R. 2053 because I believe the CAB decision in the competitive marketing investigation would further exacerbate the very confusing situation which now confronts the airline industry, the traveling public and travel agents. Agency services to the traveling public would be seriously impaired without a system that maintains reasonable standards for financial responsibility and technical competence in the industry. I believe the travel agency industry would survive the CAB decision, but only at massive cost to the many small businesses it represents.

Most of the arguments favoring this point of view are already in testimony given to this committee by ASTA, ARTA, ATA, TIA, AAA today and others supporting H.R. 2053. I wish therefore to focus my remarks on the necessity for continued dialog among carriers and their agents in the marketing and distribution of airline tickets—dialog which I believe is not possible without a specific grant of antitrust immunity. Three recent issues will serve to illustrate my point: One, the Continental bankruptcy and the default protection plan; two, computer reservations systems bias; and three, in-plant commission level adjustments.

With regard to Continental and the default protection plan, the DPP provides a very important benefit to the traveling public by protecting their investment in airline tickets in the event of carrier bankruptcy. In so doing, it helps to maintain public confidence in both the carriers and the system of distribution, and thereby reduces the risk of cash flow loss to financially troubled carriers. Recognizing the benefits of intercarrier discussion on this issue, the CAB issued a specific grant of antitrust immunity which allowed the carriers to create this plan.

When Continental Airlines filed for bankruptcy, the ATC, after a period of indecision, refused to invoke the DPP. This has resulted in a potential loss of millions of dollars to passengers and travel agents holding Continental tickets. Although the CAB has threatened to revoke the antitrust immunity, I believe that the apparent failure of the plan exemplifies the complexity of the issues, and suggest the need for further dialog. As long as antitrust immunity permits the carriers to discuss this issue, the DPP's deficiencies, if any, will be corrected and the public's interest protected.

The issue of "plating around" has also come up in current discussions concerning the Continental bankrupty and, of course, the Eastern bankruptcy threat.

When the financial weakness of a carrier is made known, travelers avoid booking its services, and agents in behalf of their clients, do the same. Agents can also protect their clients by issuing tickets payable to another carrier through the area settlement plan—the clearinghouse for agent payments to air carriers—even though services are booked on the financially weak carrier. Whenever this is done, the agent is said to have "plated around" that carrier.

The plating issue was recently subject to a CAB order designed to prevent agents from favoring a particular carrier with increased cash flow in return for more favorable commissions. This order will most likely require further modification in view of the recent bankruptcy concerns of Continental and Eastern Airlines. Here again, antitrust immunity is necessary to provide for open dialog on the issue.

I believe that the response of Congress and the CAB to the issue of CRS bias is entirely out of proportion. There are bias problems, of course; but the combined weight of a DOJ investigation, congressional concern and calls for action, and the CAB's advance notice of proposed rulemaking appears to be overkill. As yet, there is no demonstrable proof that there is any disadvantage to the public from CRS bias. Nonetheless, administrative and legislative policymakers are pursuing remedies that may curtail the very competition that led to the system development in the first place.

CRS capability and system development is an excellent example of free market competition in action. The carriers who had the foresight and initiative to invest time and capital in a CRS system are benefiting from increased market share. Agents are benefiting from a wide and expanding array of system capabilities without which they would not have been able to keep up with the rapid changes in fares and schedules. And the traveling public is benefiting from increased services and accuracy of information available from travel agents.

Earlier this year, ASTA proposed that the CAB grant antitrust immunity to convene a meeting of carriers and agency groups to review the complaints and establish acceptable standards of bias. I believe that this should be reconsidered and that a little more dialog among carriers and agents would result in an acceptable solution.

Here again, the availability of antitrust immunity would be key. On the subject of in-plant commissions, as was described earlier, an in-plant is a travel agency branch office on the premises of a corporation which is staffed, at least in part, by employees of the corporation, as distinct from employees of the agency. Under ATC rules, the travel agency is permitted to pay the corporation for the personnel and facilities it supplies. Most airlines pay a reduced level of commission, typically 3 percent, for sales to the corporation by the in-plant. In-plant rules are established by the ATC standard agency agreement which has antitrust immunity. This agreement is updated and interpreted on a regular basis by carrier/agency dialog, as Mr. Brown just described, and is also permitted under this immunity.

Recently, most of the major domestic carriers were involved in a series of changes and reversals in commission level payable to in-plants, levels which varied from zero percent to 10 percent before returning to their historic level of 3 percent. These gyrations were triggered by a suggestion within the ATC that all in-plant rules in the standard agency agreement be eliminated. My point here is that there is significant competition among the carriers and that this competition is not inhibited by antitrust immunity.

It is also worth noting that there is no inhibition of competition among travel agents in pursuit of corporate business under the present antitrust immunity. In-plant contracts are negotiated at varying levels of payment to the corporation for services they provide. In normal, non-in-plant corporate business, many agents return a portion of their commission to the corporation, carrier objections notwithstanding. Both of these are clear examples of price competition at the agency level.

In summary, I believe that antitrust immunity as provided in H.R. 2053 is necessary for the maintenance of the public benefits of the existing airline distribution system. This immunity will be of increasing importance as economic and technological conditions continue to change. Without it, the industry will be subject to an extensive period of regulation by litigation. I believe that this will end in a reregulation by legislation, as Congress seeks to maintain a viable domestic air transportation system.

Thank you, Mr. Chairman.

Mr. ANDERSON [presiding]. Thank you, Mr. Johnson. Mr. Brown, too.

We have a vote. That is the second bell to vote. I will have to go vote. We would like to have you stay because I know there will be a few questions asked of you. It will take about 10 minutes. So we will stand in recess at the moment for about 10 minutes and we will be right back.

[Brief recess.]

Mr. MINETA. The subcommittee will please come to order. I appreciate very much the testimony of the three of you, and now I will get into the question-and-answer portion. The testimony of the panel discusses the benefits of a system of a common accreditation to insure that agents are honest and competent. You suggest that if the CAB's decision stands, and antitrust immunity is withdrawn, the system of common accreditation will collapse. However, all the Government witnesses at our hearings, including the two leading Government antitrust officials, the Chairman of the FTC and Assistant Attorney General for Antitrust testified that there are no antitrust problems with an agreement with reasonable standards to insure that agents are honest and competent and financially responsible. So in view of this testimony, why do you conclude that common standards could not continue without some form of antitrust immunity?

Whoever would like to respond may do so.

Mr. Brown. Well, Mr. Chairman, I will attempt to start the discussion on that from the panel.

Mr. Mineta. Mr. Brown.

Mr. Brown. Referring back to my comments, the airlines brought the ATC and IATA accreditation system into being. It was the airlines that created it. It is our feeling that the airlines can therefore remove the systems if they feel it is in their best interest to do so. U.S. Air has said with respect to the agency program that without antitrust immunity, there is a serious risk of eroding, possibly destroying the worldwide interline system. We believe that the interline system and the agency accreditation programs are inseparable in that the almost nonbarrier minimum standards that exist insure each member of the interlining system that the sellers of the air transportation have met minimum financial standards, experience standards, and minimum, I guess that is just about it for standards.

We believe that. And we are concerned that there is a great risk involved. We get into the third-party participation procedures, whereby anyone, not just travel agents, can go before the Air Traffic Conference and let their views be known. I can speak only for the American Automobile Association, but we would not go before the Air Traffic Conference and make our points without antitrust immunity. We are addressing a group of competitors. There may be some of our competitors present. And we would not subject ourselves to litigation in that area.

All I can say, then, is the signals we see and receive and this sort of thing, and we do take the airlines at face value, such as U.S. Air, that indicates that without antitrust immunity, they would not risk even those very minimal accreditation standards.

I don't know if that answers your question, Mr. Mineta.

Mr. Mineta. That is fine.

Mr. Johnson.

Mr. Johnson. I would like to expand on my remarks in that context. We are in a period of what appears to me to be tremendous economic and technological change in the airline and airline agency businesses. Every change that comes about creates some new condition or question as to the relationship among the airlines and their distribution arm. In view of what I would expect to be the continued frequency or continuation of that kind of change, it occurs to me that without the opportunity for open dialog on the effect of such changes, I believe that was the burden of my presentation, without the opportunity for open dialog on these issues, the system ultimately would have to collapse.

There would be less and less reason, less and less opportunity to openly discuss the issues as they come up or as they change.

Mr. Mineta. I am just wondering, and I know what airlines are saying right now, it just seems to me it would be a difficult case to put forward that they would give up a valuable system because of the fear of frivolous lawsuits. I am just wondering, given the fact that the airlines operate under a number of agreements which don't have antitrust immunity such as the airline clearinghouse and the Universal Air Travel Plan, and that the fact that it is beneficial to them to go ahead and do these things, are they really going to be fearful of the possibility of frivolous litigation. It just seems to me it hasn't deterred them in these other areas. And I am just wondering, you know, are they really not going to pursue these relationships because of the possibility of some frivolous lawsuits.

Mr. JOHNSON. I think the point I would try to make if we just take the area settlement plan as a case in point, there are continuing, there is a need for continuing dialog as to the mechanics of handling that plan. If the carriers are not free to discuss changes that come about under the protection of antitrust immunity, the discussions won't take place.

Mr. MINETA. What about the airline clearinghouse? Do you need continuing dialog there?

Mr. JOHNSON. If we were to lock the airline—I am sorry, I am referring to the area settlement plan. Is that the same term, airline clearinghouse or are you talking about something else?

Mr. MINETA. The airline clearinghouse of the airlines themselves not the area settlement plan.

Mr. JOHNSON. I am not sufficiently familiar with the airline clearinghouse procedures to comment, Mr. Chairman.

Mr. MINETA. Mr. Johnson, I would like to ask about a statement that was attributed to you in Travel Weekly on the 18th of August. When asked about an attempt by American Airlines to cut agent commissions, you stated that your agency would have to "look very carefully at its American Airlines sales and decide whether or not it should continue that kind of productivity." Now, I recognize that your company has the right to refuse to do business with anyone whom you feel is not paying you enough for your services, but it also seems to me that when a refusal to do business by you and others is publicized in the trade press, other agents are encouraged to also refuse to do business, and it begins to look more and more like a concerted action by the travel agent industry. Do you think there is any need for limits on the publicizing of individual agent's actions when an airline tries to lower commissions?

Mr. JOHNSON. I think each individual travel agent has to make his own decision as to what action he will take in the event of a reduction of his income or potential reduction of his income. I have been disturbed by the implications that travel agencies are boycotting or are pressuring the airlines. Those comments have been presented here by others today, and I guess in previous testimony. I know in my own organization, our own organization, Travel Trust International, we are extremely concerned about the implications of boycott. And we do not take concerted action. We make individual decisions. I know that the same kind of concern has been expressed by ASTA and others. I don't know that that answers your question.

It would seem to me that to prevent or to seek to prevent someone who is in a position of responsibility in an association from expressing his own point of views would not necessarily benefit whatever circumstance may be under discussion.

Mr. MINETA. Your testimony, Mr. Johnson, also discusses the recent attempts to change the commission level for in-plant sales. As I understand it, the end result was that the effort to eliminate these commissions failed. You cite the situation as showing that there is substantial competition in the agency business. However, the airlines' inability to cut commissions has also been cited as showing a lack of market power on the side of the airlines when they deal with agents. Don't you think that the recent inability of carriers to cut commissions, either in-plant or otherwise, suggests that the agents might have some substantial market power?

Mr. JOHNSON. I don't think I would deny that the agents have substantial market power in view of the fact that they are selling 65 to 70 percent of the airline's products today. My feeling is that the rapid movement of the commission level in the case of in-plants demonstrates that there is competition among the carriers for agency business today, notwithstanding the antitrust immunity. That really is the point that I was seeking to make. That competition does exist. That the airlines seek to obtain and retain agency business, as in the case of in-plants, by varying or attempting to have the in-plant commission level, I think further, and this now relates to the agency side, that there is a substantial degree of agency competition in the pursuit of corporate business and other lines of business. This is agency-to-agency competition as opposed to airline-to-airline competition in seeking travel agents' business.

Mr. BROWN. Mr. Chairman.

Mr. MINETA. Yes.

Mr. BROWN. I wonder if I may also address that particular subject.

Mr. MINETA. Sure.

Mr. BROWN. I am afraid I do not quite share my good colleagues from the TTI's position on the fact that agents have a great deal of power over air carriers. In fact, there may be some individual agents who may try to exercise that kind of influence. But as an industry, I don't think it would work very well. And as an industry I don't think that it has really attempted. Agents do not engage in recriminations against airlines or seek the highest level of commission as a standard rule.

As an example, in the 3 percent, the escalation in the 3 percent commission to 10 percent commission at in-plants, there were many agents that found that repugnant. They were concerned as to whether that additional 7 percent would be earned. They have a mission of generating traffic as opposed to the lower rates of commissions that are earned by in-plants where the generative situation doesn't exist.

May I give you just one example? There were even some agents, and we have one of ours, who is a very large in-plant. That agent called me on the phone and said, "Bill, we have been approached by an airline on the subject of 10 percent versus 3 percent versus zero percent." And this is what I have told them. I prefer the 3 percent. But if the choice is between 10 percent and zero, I will take zero percent.

And the question then came, you know, why would you accept zero percent? Because that sort of thing will cause the airline industry to seek another distribution system. Everything is in place that allows them to seek that system. The Board's rulings in ER 1246 on September 15 of last year. The doing away with tariffs and tariff filings. The rule filings on December 31. All of those elements have said that this industry in its present financial state should not be bled in any manner, shape or form. We feel that 10 perent is compensatory for the generative agent.

But if we have a choice on our in-plant operations, and it is very large, we will go to zero percent, because we believe that that is what the public really needs in a situation like this. Can't afford to be whipsawed.

Thank you, Mr. Chairman.

Mr. MINETA. We have a call of the House for a vote. It will be a two-part vote, Mr. Anderson. The vote on the motion to recommit, followed by the vote on the final passage of the Intelligence Authorization Act. So we will recess for about 20 minutes.

[Recess.]

Mr. MINETA. The subcommittee will please reconvene.

Mr. Johnson, and Mr. Brown, could you tell us what steps your agencies take when there is an airline which is in poor financial condition, and bankruptcy is a possibility? Do you still recommend flights on the airline if they have the best schedules or lowest fares? Do you give any warning to your customers or try to discourage them from flying on these airlines and book them on some other carriers? If you could share with us what you do in those instances?

Mr. JOHNSON. If we are convinced that there is a serious financial risk to our client, we will convey that risk to the client, and we will recommend that they do not book services on that carrier, especially in the situation where there are alternate services available from other carriers. Occasionally there are situations in which there is no comparable alternate service, or comparable fare, because there is a great deal of concern on the part of an agent to locate the most attractive fare for a client.

In a situation where there are no alternatives, we will again advise the client of the risks, and then go ahead and book the service, and watch it as closely as we can.

Mr. MINETA. This time, if I could use names, we had the situation with Continental, where on Saturday they announced their bankruptcy and on Tuesday they started flying again. But we also had another carrier, Eastern, saying if they didn't get an agreement with their employees that they would in fact go into bankruptcy.

Let us say I come into your agency to go somewhere, let us say, on the 27th of October. You are a little uncertain given what Eastern said as to whether or not to book me with Eastern. Or do you figure, Eastern is big and they are not going to go under. We will put Norm on Eastern?

Mr. JOHNSON. I can tell you with respect to our activities that we did not off-sell Eastern Airlines during that period. We did when we were coming down to the wire and there was still a question on whether or not they were going to go out, I believe on the 12th of October. We protected our clients with alternate space, maintaining the Eastern booking but protected them with alternate space. We continued to issue tickets on Eastern Airline for flights which were going out at that time.

I think that is partly a judgment factor. We did alert our clients in all cases to the circumstances, to the extent they needed to be alerted, because it was publicized pretty widely in the press. In any event that is the approach we took with respect to Eastern.

Mr. MINETA. Mr. Brown.

Mr. BROWN. Mr. Chairman, just a little historic background. Last, I believe it was November, under ATC resolution 1.40 we went before the Air Traffic Conference at its fall meeting in Greensboro, N.C., and pointed out to the conference that, in our opinion, the airline default protection plan was not a public protection plan because it was absent positive reservations for the passengers who were ticketed on the default carrier.

The reservation conditions of the plan, just the space availability of it, we contended that it was equally, if not more, an area settlement plan protection plan as opposed to a consumer protection plan. After pleading before the Conference on this issue, we told them that we would institute our own airline default protection plan. In fact, indeed we have done that. So in the case of Continental, any tickets that were purchased prior to cessation of operations were covered by our airline default protection plan. And our plan is designed to refund in that circumstance the totally unused Continental ticket or if the passenger is enroute, to make a passenger hold and allow the passenger to go and make reservations.

We do not sell that plan. We pay for it at the rate of 10 cents per ticket. And so while it may appear, and it does in fact give us a competitive edge in that area, we support that concept, and we applaud Eastern Airlines for suggesting that there be an insurance program and this sort of thing. I think we have solved the fundamental thing of having to plate away, or sell away, on the other side of the coin, we do believe that agents as private entrepreneurs, their business, they should have the opportunity to decide whose plate they are going to use in the sale of air transportation. We believe that this is a business judgment.

Now, having said that, we also warn our passengers because not only is it our obligation to do everything we can to relieve the financial problem, but also to spare them the inconvenience. And certainly, as we read the press, we have to look at that sort of thing. But in the case of Eastern Airlines as an example, I have had several of our agents contact us and say what shall we do? We have looked, they are participating in our own AAA default protection plan, and we ask them to proceed accordingly. That they are at liberty to do so.

Mr. JOHNSON. May I comment further on that, Mr. Chairman?

Mr. MINETA. Surely, Mr. Johnson.

Mr. JOHNSON. The Continental bankruptcy has been an expensive one for my agency. At the present time we have claims being filed with the bankruptcy referee in the amount of $2,000. We have absorbed all of the losses that are indicated in behalf of our clients in that situation. I would like to cite one further circumstance which I think is in response to your question. And this involves the TTI association as opposed to my agency, individually.

As you may recall, last fall there was a great deal of question as to the financial capability of Pan Am. We began discussions with Pan Am as an association, and in the early part of this year, we concluded an overrun commission agreement with Pan Am and spent a considerable amount of time and effort publicizing the fact that we were committed to Pan Am as an association, and felt that their financial problems were behind them because we were convinced that that was so.

And I think that that effort was beneficial on Pan Am, as it was intended to be from our point of view.

Mr. MINETA. Thank you.

Mr. Toohey?

Mr. TOOHEY. Mr. Chairman, I would like to make a comment that might add to the perspective of the hearings. These hearings and this issue are largely airline and travel agency related as they impact on the marketing of air travel. And the hearings to date have centered on that issue and the technicalities that surround it.

The point of perspective that I would like to make is that the Travel and Tourism Government Affairs Council is comprised of all the diverse elements of the travel and tourism industry, including the airlines and the travel agents. And it is the purpose of that Council to identify issues that affect the total travel industry and to formulate industry policies and positions on those issues. And after careful deliberation on this particular issue, which the industry recognizes as basically an airline and travel agent issue, it was determined that without question, it impacts the entire travel industry and all of its components.

And so it is important I think from the standpoint of perspective to understand that the travel industry, in supporting the system as it has existed over 40 years, is demonstrating that all elements of the industry, even those that have not been represented in these hearings, have found that the system under which airline travel is marketed has been a successful system, and has added to the growth of travel and tourism, and apparently has satisfied consumers as well.

I wanted to make that comment so that you would have that perspective on the issue that you are considering.

Mr. MINETA. Very well. Thank you very much. We are all well aware of the work of the Council.

Mr. Anderson?

Mr. ANDERSON. Thank you, Mr. Chairman.

Mr. Toohey, I was going to ask you a question, and you just answered it. But I am going to develop it a little bit, because this morning there was a question brought out that perhaps someone who represents an association really doesn't have the support of those member organizations because they in person are not here. Of course I looked at your rather impressive list of yours here, 29 of the largest travel and tourism organizations. And as you just identified a moment ago, they do meet and conclude that the travel agency system offers important advantages and so on, that you support H.R. 2053.

Tell me, then, can we follow that and assume that each of those 29 organizations do support H.R. 2053?

Mr. TOOHEY. Not every element of the travel and tourism industry perceives itself as a direct beneficiary of the issue at hand. But every national association that comprises this Travel and Tourism Council understands that the present system of airline marketing has been successful and has helped the travel industry in its growth. And while they may not be directly concerned with it, they are supporting it from that larger perspective.

Those that are involved more directly with the agency-airline distribution system, are supportive of the way the system has been, and the Travel and Tourism Government Affairs Council definitely speaks for them.

Mr. **Anderson**. Obviously I would understand that. That you do have the Air Transport Association and airlines and so on who are directly involved in it. Again, when you go to groups like the American Car Rental Association, and the National—all of these, in other words, they may not, as individual associations, they may not endorse H.R. 2053?

Mr. **Toohey**. They would be neutral on the issue and would support the Council's endorsement of it because of what it means to the total travel industry.

Mr. **Anderson**. Because that is a very impressive list. Even the large members you have, themselves are pretty impressive. I wanted to kind of bring out what your support really meant when it came to those 29 organizations or associations, rather.

I suppose my next question could be directed to any one of you there. Many have testified that the CAB decision would lead to the destruction of the conference system. What would happen if this system came to a halt?

Mr. **Toohey**. That is speculative I think, Congressman.

Mr. **Anderson**. Yes.

Mr. **Toohey**. In listening to these hearings, you are hearing both sides of the coin. It may or may not be reality. It certainly is speculation.

Mr. **Anderson**. It may not be as bad as one side thinks it would be, but it may not be as good as the other side thinks, is that what you are saying?

Mr. **Toohey**. That is exactly right.

Mr. **Anderson**. Many opponents of H.R. 2053 continually use the term "exclusivity" when describing the current system. Do you believe the travel agent exclusivity exists today?

Mr. **Brown**. No. I think that was a very bad term, Mr. Congressman, that was used, exclusivity. By the farthest stretch of the imagination, what some would feel would be exclusivity was originally pinned to the point that only travel agents would be compensated other than the—that travel agents would be compensated for the sale of air transportation.

Today, the flexibility, removal of the tariffs and that sort of thing, others can be compensated. There is no reason, nothing to stop them from being compensated. Currently before the Board there is a resolution, 90.5, I believe, that permits the appointment, if you will, by individual air carriers of other than travel agents as sellers of air transportation.

In that same resolution which has our endorsement and is before the Board awaiting Board action, it allows two or more carriers to appoint the same agent, or appoint the same seller, if you will. Not agent as such with a capital A. On your other—I don't know, Congressman Anderson, if that answers that one part of the question. On the other one, you will recall——

Mr. **Mineta**. Excuse me. Would the gentleman yield on that?

Mr. ANDERSON. Sure.

Mr. MINETA. The term exclusivity it seems to me says that these people have to be appointed, and exclusivity in the sense that I just can't walk in and say, Mr. Brown, I just sold Mr. Anderson a ticket on Friday from point A to point B on American Airlines, and I would like to have that booked through you.

Can I be compensated for that? I don't believe so. I think that is the reason for the exclusivity. It is just that people have to be accredited and because of that, to that extent, it is exclusive.

Mr. ANDERSON. Mr. Chairman?

Mr. MINETA. Yes.

Mr. ANDERSON. If you bought that ticket from me and gave me your hard-earned money, wouldn't you hope that there was a ticket behind it and that I have some credibility.

Mr. MINETA. Oh, no question about it. I am just going back to the term exclusivity.

Mr. ANDERSON. I was thinking taking our case. You would never get your money back.

Mr. BROWN. Mr. Chairman, as I understand it, and I could be wrong, American Airlines could designate you as the seller of their air transportation, regardless of what form of business you may be in. You would not have to be an agent of American Airlines as such under this resolution that is before the Board at the present time.

Mr. MINETA. How do I get to become an agent?

Mr. BROWN. You are a, to use the term, nonagent.

Mr. MINETA. Under the Yoder decision of being a nonagent?

Mr. BROWN. No, that is what the situation is at the Board at the present time. There is a resolution at the Board at the moment, Resolution 90.5. We have no problem with that. That would allow American Airlines to designate anyone it wants to to sell air transportation and not be an agent. But that is on-line air transportation. That is not the interline antitrust immunity coverage air transportation.

Mr. MINETA. All right. But isn't that as far as the Board went? Isn't that what the Board in effect said?

Mr. BROWN. It is an Air Traffic Conference resolution currently before the Board.

Mr. MINETA. That is the very thing——

Mr. BROWN. We have no problem with that at all.

Mr. MINETA. But it seems to me that is the very thing that would be overturned by this legislation.

Mr. BROWN. I don't believe that it would be. I don't see that exclusivity applies there. I don't see that it would.

Mr. MINETA. I thank the gentleman for yielding.

Mr. BROWN. If I may, then, Mr. Chairman, go back to Mr. Anderson's question.

Mr. MINETA. Surely.

Mr. BROWN. As to what would happen if there were not an agency rule. In my opening remarks I said that, although AAA might very well be viewed as a major beneficiary of the collapse of the ATC and IATA agency programs, and in my closing remarks I believe I said something to the effect that, let me find it, if I may, just to be sure of what we have said, although AAA is not likely to be greatly affected by the demise of the ATC agency programs, what we envision would happen is we would become a dealer or a broker, with the size of the distribution system that we have.

We have the largest travel agency in the United States. We have 681 accredited agency locations. In the United States and Canada, we have 1,033 offices. We in all probability would be cited as one of the dealers or brokers for these airlines. Now, that is why it was said to me during the proceeding, you know, why do you oppose this sort of thing, because you would be the principal beneficiary of such concentration. That was a very shortsighted statement.

The reason we are for the agency program, if we went in that other direction, we would give away our objectivity and our impartiality, and we would perform a lesser service under that arrangement on behalf of our 23,600,000 members who constitute approximately 11 percent of the adult population of this country. So that is why we take that position. Certainly, in the short term we would be OK. There are some who say that if this agency program disappears, the current count will probably go to something like 23,000 and fall back to 8,000 or 9,000.

You raise the question, Congressman, and that has been an area of very critical concern to the American Automobile Association. We have an obligation that far transcends our commercial interests in the travel agency part of our operations. That is why we created the default protection plan. We are willing to work with other organizations in developing a default protection plan for this entire industry.

And that is why we believe that this agency program that was created over 40 years ago, I have agency agreements in my office that were dated pre-Pearl Harbor, pre-World War II. We believe in that agency program because it has served our members so well. And that is why we plead that your committee, Mr. Chairman, will give its blessings to this legislation.

And if you have problems with this legislation, the way it is worded, it is not difficult to envision those problems, we, too, have some consternation about the Civil Aeronautics Board, about Congress overruling the CAB in favor of its administrative law judge. But there is an answer to preserve antitrust immunity, to preserve interlining. This is what is before us today, is your bill, Mr. Anderson. And it is the only platform or avenue we have to address this in a positive way.

We can understand the concerns about it. I am frankly amazed that more have not signed on to it.

Thank you.

Mr. ANDERSON. During our hearings we have heard many times the statement that the reason the airlines support H.R. 2053 is because they fear travel agents' reprisal. And I question that myself. As a matter of fact since introducing the bill, I have had a chance to go around the country and meet with travel agents. And I find that they are not that well organized. I find in my own area the travel agents don't even know I have the bill.

So how they could be so effective that they could blacklist an airline and really make it deliver, I question that. So I made up the question, do you believe that the airlines support H.R. 2053 out of fear of travel agent reprisal? Anyone of the three of you.

Mr. **Brown**. I will respond to that. In our opinion, no. We don't believe that. There are individual, high-producing agents that have influence on air carriers. But the agency industry in totality, no. We do not believe that the airlines are acting and reacting out of fear or concern for how the agency community feels.

This distribution system obviously is the most economical and most efficient one in place. And having said that, if the day comes that it is not, you may be sure, I am sure, Mr. Anderson, that the airlines will change the distribution system. They created this one. They can do away with it.

Mr. **Toohey**. That is a question that is hypothetical, at best. My own personal experience—and I talk to a lot of airline people in the daily course of my business—is that I have never heard an airline executive express that fear.

Mr. **Johnson**. If I may, I would subscribe to those remarks exactly so. I think that argument is a very specious argument. I think to some extent it is a self-serving argument to those who would make it. It seems quite clear to me that the airline distribution system as it exists today is of benefit to the carriers, and that is why they want to maintain it. The issue is as simple as that.

Mr. **Anderson**. I have one more, Mr. Chairman. Any one of you to this. Are you aware of any type of new technology that would be precluded in the industry if H.R. 2053 was passed into law?

Mr. **Toohey**. I am not. I agree with what you said this morning, Congressman. The travel agent industry has been very adaptive over the past four decades to technology. Look at the technology they are operating with today. What reason is there that they wouldn't continue to expand those opportunities, as technology presented itself to them?

Mr. **Anderson**. Thank you, Mr. Chairman.

Mr. **Mineta**. Thank you, Mr. Anderson.

Well, Mr. Toohey, Mr. Brown and Mr. Johnson, I want to thank you very much for taking the time to be here and to present your testimony and enlighten the subcommittee on this whole subject matter. I do appreciate your being here. Thank you.

[Subsequent to the hearing the following letter was received from Mr. Toohey, president, Travel Industry Association of America:]

Travel Industry Association of America,
Washington, D.C., October 24, 1983.

Hon. Norman Y. Mineta,
Chairman, Subcommittee on Aviation, House Committee on Public Works and Transportation, Washington, D.C.

Dear Chairman Mineta: The Travel Industry Association of America (TIA) appreciates this opportunity to set forth, for the record, its position on H.R. 2053, "The Air Travelers Security Act of 1983."

TIA fills a unique need in the travel industry that stems from the industry's own diverse nature. Our membership is drawn from the airlines, attractions, hotels and motels, travel agents, tour operators, convention and visitors bureaus, state government travel offices, food service establishments, intercity bus and rail lines, and other components of the travel industry.

Tourism in America is served by nearly a million different businesses that offer a wide range of services to the traveler. Some of these businesses are organized nationally by industry component and are represented by trade associations that promote and protect their specialized interests; however, to represent the broad base of tourism, the Travel Industry Association of America deals with issues of interest and concern common to all in the travel industry. The Civil Aeronautics Board's competitive marketing decision is but one of these issues.

The travel industry is now our nation's second largest retail industry. In 1982, it generated $194 billion in receipts, and $20 billion in federal, state and local tax revenues. The industry directly employs 4.5 million American workers at every level of skill and indirectly provides another 2.2 million supporting jobs. It is noteworthy that there are over one-half million U.S. businesses serving the traveler and, like the travel agent component of the industry, most are small businesses.

TIA has been actively involved in this issue for several years. In late 1980s, we initiated a study for U.S. Congressional Travel and Tourism Caucus that provided a basic understanding of the travel and tourism industry, its present retailing network and its interest in the CAB Competitive Marketing Case. The study illustrated the high quality of service provided by the ATC-accredited travel agent system. Essential findings of the study are as follows:

> Airlines depend on ATC-accredited travel agents for 60 percent of their domestic ticket sales and at least 75 percent of international ticket sales;
>
> Tour operators, hotels, motels, travel attractions and other sectors of the travel industry, both in the United States and in foreign countries, also require the retailing services of the ATC-accredited travel agents.
>
> The accreditation system provides airlines and other elements of the travel industry with direct marketing and selling access to communities in all sections of the country, including those remote from individual locations of travel industry facilities or airline route systems;
>
> The present system has met the public need for easy access to experienced travel advisors competent to counsel and to inform travelers about available travel and transportation options.

TIA has concluded that the present travel industry retailer/supplier relationship (travel agency system) offers important advantages to both the traveling public and many sectors of the travel and tourism industry. Without replacing it with an equally effective distribution system, destruction of the agency system would have serious adverse consequences to both the public and the travel industry, including potential economic dislocation of over 18,000 small businesses.

For these reasons, TIA supports H.R. 2053, "The Air Traveler's Security Act of 1983."

Sincerely,

WILLIAM D. TOOHEY, *President.*

Mr. MINETA. I would now like to call forward a panel to be made up of Mr. Marty Duggan, director, Meeting and Conventions of the National Pest Control Association, and Mr. Jim Rauter, senior associate editor of Meeting News; and Mr. John Crump, executive director, National Bar Association.

The full text of your prepared statement, Mr. Duggan, will appear in the record at this point.

[Statement referred to follows:]

STATEMENT OF MARTY DUGGAN, DIRECTOR, MEETINGS AND CONVENTIONS, NATIONAL PEST CONTROL ASSOCIATION

Mr. Chairman and Members of the Subcommittee: I very much appreciate the opportunity to be here to discuss H.R. 2053, the Air Travelers' Security Act of 1983—a cute title for a piece of legislation that no consumer advocacy group has spent ten cents to support.

Airline deregulation and its full potential will never be realized if this piece of special interest legislation beneficial to the travel agent community almost exclusively is passed.

Groups such as the National Pest Control Association that create business for the travel and hospitality industry have an economic stake in a totally free market for airline services including the ability to not only handle all negotiations with the airlines, but also to receive commissions or further concessions in lieu of commissions.

We create the convention and meetings business—travel agents do not. They, because of their unique, protected position, can reap the rewards of what we create.

After saying all that, I want to state that I use travel agents. As a matter of fact, I'm on my fourth travel agency in four years. For the most part, our post-convention tours are negotiated by me personally. I arrange with the hotels and the air carrier to set up the trip. After the negotiations have been concluded, I turn the business over to the travel agent. He gets paid—I don't.

Three years ago, a large local travel agent made a pitch for our convention business going to Los Angeles. When asked if they had a toll-free 800 number, they replied that they didn't need one. Our group would use the American Airlines 800 number and with a numerical code, the reservation would be made by American and the travel agent would receive a printout weekly from which to issue the tickets. Now I ask you—do I need this type of travel agent service?

The attached letter from Modern Travel Service dated August 1, 1983, was written in response to a quote of mine in "The Travel Agent", a travel trade publication. Prior to August 1, 1983, I had no knowledge of Modern Travel Service. As you can see, Mr. Joe Timmel says he "is in full agreement with my views regarding not extending antitrust immunity to travel agents. His reasons for agreeing that travel agents don't need antitrust immunity are totally different from mine. This is great—he feels he has a superior service and that he can do more, and get more for a lower cost than I can without antitrust immunity. This man will thrive in a competitive market situation.

Testimony was given on this subject before the Senate on October 4, 1983 by a vice president of AAA. He made a strong case for travel agents and their unique service. He stated that they perform at little cost and few complaints from the public.

The Better Business Bureau paints a different picture. BBB ranks 82 industry groups in order of complaints received. We all know and have had experience with credit card problems from department stores or banks, etc. Credit card companies rank 36th. Travel agents rank 37! As I said, I'm on my fourth travel agent in four years and it's not because they rendered good or superior service.

One of those agents was bragging last year about making airline reservations to Tokyo for 16 doctors attending a medical meeting. He only wrote the tickets. They went first class—his commission was $16,000. Japan Air Lines paid him 40 percent commission.

The gentleman from AAA said in previous testimony that unless travel agents are granted antitrust immunity, the AAA would not be a party to the Area Settlement Agreement from that point forward. I just wish Congress would not pass H.R. 2053. Wild horses couldn't keep AAA out of the Area Settlement Agreement! There's just too much money involved.

This bill is not in the public interest. 22,000 plus travel agents spreading great amounts of money are trying to perpetuate a system from which they are the primary beneficiary. Their stranglehold on the distribution system should not be allowed to continue.

Travel agents in local communities will not be run out of business. This is a service industry and agents like Modern Travel Service will not only survive but will prosper and we will all benefit.

Mr. Chairman, committee members, I thank you for your time.

MODERN TRAVEL SERVICE,
Chicago, Ill., August 1, 1983.

Mr. MARTY DUGGAN,
Director of Meetings and Conventions, The National Pest Control Associations, Dunn Loring, Va.

DEAR MR. DUGAN: I read with interest your opposition to antitrust immunity for travel agents in the Travel Agent, August 1, 1983. As a travel agent, I am in full agreement with your views but for very obvious and different reasons. There are many services a travel agent can offer an association which the same cannot do itself unless it is willing to undertake considerable expense.

First, though "you" may only be able to negotiate 30 percent off coach fares for your membership when dealing directly with an airline, a cost conscious travel agent (like Modern Travel Service) can, in most cases, structure fares 40 percent to 50 percent off coach . . . and often times, even more (please see the enclosed brochures). With groups of considerable size, a travel agent can do even better by negotiating special (unpublished) fares for an Association account.

In addition, a travel agent, by booking "specific" amounts of people on a "specific" airline for a "specific" association can receive complimentary tickets for the same association. These tickets are usually issued on a ratio basis of "one per fifty" but in many cases, this ratio basis is much better.

As a travel agent, we offer our association accounts "our" staff on location during meetings and conventions to handle any ticketing inquiries, room assignment problems or change requests, tours and spouses's programs, airport to hotel transfers and return, and much, much more. We also arrange post and pre convention tours for the benefit of the membership. If one is flying to San Francisco from Boston for a Convention, a post-tour to Hawaii could be arranged very inexpensively using San Francisco as as stop-over point. The cases in-point on this are limitless.

The services we offer our association accounts are unlimited . . . services almost all association's could not afford to do their own on a full time basis. Add to this our travel expertise and professionalism, and the CAB ruling can do nothing but enhance the services we have to offer association's such as the National Pest Control Association.

Sincerely,

JOEL TIMMEL,
Modern Travel Service.

Mr. MINETA. Please proceed.

TESTIMONY OF MARTY DUGGAN, DIRECTOR, MEETINGS AND CONVENTIONS, NATIONAL PEST CONTROL ASSOCIATION; JIM RAUTER, SENIOR ASSOCIATE EDITOR, MEETING NEWS; AND JOHN CRUMP, EXECUTIVE DIRECTOR, NATIONAL BAR ASSOCIATION

Mr. DUGGAN. Thank you, Mr. Chairman.

First of all, Mr. Crump I feel should go first at this time because he has got to go back to his office and catch a plane.

Mr. MINETA. Very well, Mr. Crump, you are on.

Mr. CRUMP. Mr. Chairman, members of the committee, my name is John Crump. I am the executive director of the National Bar Association. I am here today to present the views of the National Bar Association on H.R. 2053, the Air Travelers Security Act of 1983.

The National Bar Association was founded in 1925 and now consists of a network of over 8,000 minority lawyers, jurists, scholars, and law students, with affiliate chapters in 40 States and the Virgin Islands.

As a relatively small association, the National Bar Association looks with disfavor on any act that attempts to provide exclusivity to any segment of the economy. It is our view that H.R. 2053, if carried to its logical conclusion, would at least place travel agents in a most favorable position by limiting access. It is only since the Airline Deregulation Act of 1978 that small associations have been able to gain any access to discounts from the airlines.

In many instances this small margin of discounts and familiarization travel has been the difference between red ink and black ink on the financial statements of the National Bar Association and other small membership organizations. With travel costs representing a large percentage of any association's budget, the Airline Deregulation Act has been a welcomed change. The dictates of the marketplace have suddenly made the business of small associations important. This was not the case before deregulation. Although I have been able to negotiate rates favorable to the organization and its members for travel to our annual meetings, this has not prevented more than 50 percent of the attendees from continuing to use travel agents for their ticketing and travel arrangements.

In fact, in many instances the negotiated rates are still available for ticketing by travel agents. It goes without saying, the travel agents provide a useful service to the public. However, the National Bar Association would like to preserve the option of negotiating directly with the airlines or in the alternative, with a travel agency if the need arises.

I am of the belief that the full impact of the Airline Deregulation Act should take effect before it is scratched for less than valid rationale. I do not agree, nor has information been presented, which shows that the implementation of the CAB decision will be chaotic. If for no other reason, competition alone will curtail chaotic results. Specialized legislation should only be considered by this body when it is in the best interest of the general public. The case has not been made in this instance.

The group which would be protected under H.R. 2053, is not in need of protection. I submit to you, that if the full impact of the CAB decision is allowed to be realized, even less protection will be needed. The fear of change by the affected groups will then abate. It, therefore, occurs to me that legislation in this area, at this particular time is premature. If the marketplace is going to work, impediments to entry must not exist.

Thank you.

Mr. MINETA. Thank you very much.

Mr. Duggan.

Mr. DUGGAN. I would like to let the chairman and members of the committee question Mr. Crump at this time.

You can stay? OK.

At this time Jim Rauter will make his presentation.

Mr. MINETA. Mr. Rauter?

Mr. RAUTER. Mr. Chairman, members of the subcommittee, I am here today to share my observations regarding the impact of the Air Travelers Security Act of 1983 on a group of travel professionals that are seldom heard from: convention and meeting planners. Because H.R. 2053 will severely impede the development of competition in the sale of airline tickets, the bill will have a profound effect on the 70,672 professional planners who read Meeting News. And because meeting planners do not have an adequate political voice here in Washington, we feel compelled to take a stand on the proposed legislation.

We strongly urge that Congress does not pass H.R. 2053. The bill would impede the development of innovative marketing channels which could help convention sponsors increase attendance at their meetings. As a result, the legislation could stifle the growth of the convention and meetings business, which in turn would impact hundreds of local economies throughout the country who benefit from the $30 billion spent annually by convention attendees.

As a professional trade magazine in its seventh year of publication, Meeting News has closely monitored the effects of airline deregulation on meeting planners. Clearly, the freedoms and competition brought about through deregulation have benefited both convention sponsors and the communities that host conventions. As a result of the airlines' freedom to design special fares, planners have been able to reduce air travel costs. In some cases, this has enabled individuals to be present at conventions and meetings that they may not otherwise have attended.

Meeting planners have long taken the position that convention travel is, for the most part, discretionary. Individuals make their decisions on whether or not to attend a given meeting based on a number of factors, including cost, location and perceived educational or business value.

Travel today represents approximately one-third of an individual's total convention expense. This year, convention travelers will probably spend in excess of $5 billion with the airlines. So the cost of air tickets is an important factor affecting the attendance of an organization's convention.

Before deregulation, the airlines generally considered convention attendees to be nondiscretionary, business travelers. Or, at least under the regulated airline system, convention attendees were treated that way. Though the airlines might have provided meeting planners with promotional flyers and a central reservations number, they could not offer special fare incentives to boost convention attendance.

However, with the maximum tariff rules approved by the Civil Aeronautics Board in October 1981, the airlines were freed to negotiate what have come to be known as convention fares. Now, if a planner can demonstrate that his or her convention will deliver incremental traffic to an airline, that airline may respond with special fare discounts for attendees of that meeting only. Currently, such discounts average about 30 percent off standard coach fares. An airline that offers a convention fare usually expects to be named the "official carrier" of the convention. In effect, the airline joins in a partnership with the convention sponsor and the host community to promote that convention to potential attendees. Naturally, the reduced fare is used as an incentive to increase attendance.

While such arrangements have helped many associations prop up attendance in the face of recession, the CAB decision in the competitive marketing investigation takes the concept of fare flexibility one step further. As you know, the CAB decision allows for development of retail ticket outlets outside the current network of travel agents accredited by the Air Traffic Conference and the International Air Transport Association.

This could lead to the creation of discount retailers who charge customers only for the services they require. If such outlets can operate on commissions below the current industry average of 10 percent, perhaps the lower commissions will be reflected in lower ticket prices. For smaller convention groups who might not qualify for special convention fares, such outlets might represent an alternative way to reduce air travel costs and increase attendance.

But more importantly, the CAB decision sent a clear signal to the airlines that they are free to compensate customers who handle their own ticketing and reservations. If a convention sponsor is willing to book and ticket attendees' air travel in-house, why shouldn't that organization receive some remuneration, either in the form of straight commission or fare reductions? Tickets could be distributed along with the usual preconvention materials. And the ability to closely monitor reservations will give convention sponsors a better idea of how many attendees to expect. Again, any fare reductions are likely to increase attendance.

Much of my argument refers to the value of increased convention attendance. But this is not only a benefit for the convention sponsor. It is also of primary concern to the hundreds of U.S. communities that host conventions and meetings. The economic impact of conventions and meetings on local economies should not be overlooked. According to the International Association of Convention and Visitors Bureaus, professional associations alone will hold 89,804 meetings in 1983 requiring at least 50 hotel rooms. Approximately 48.9 million delegates will attend those meetings, sending an average of $515.75 per visit in the host community.

Because such expenditures create jobs and bring in important tax revenues, a growing number of second-tier cities have made substantial investments to attract convention business. Communities such as Rochester, N.Y., and Des Moines, Iowa, are currently building convention facilities as a way to increase business activity in their downtown sectors. In fact, 12 new convention centers have opened in this country in the past year, 15 are currently under construction and another 31 are being expanded.

Here in Washington, the brandnew Washington Convention Center—built at a cost of approximately $100 million—will bring in at least 250,000 convention delegates in 1984 who will spend more than $128 million. In New York City, the New York Convention Center will generate an estimated 16,000 permanent jobs and bring in approximately $82 million annually in State and city tax revenues.

The point of all this is simple: The cities of this country have a very real interest in seeing the convention and meetings industry grow. Airline deregulation—including deregulation of the ticket distribution system—will encourage such growth. Even travel agents have a vested interest in an active and growing convention industry. Many meeting planners work in partnership with travel agents to save time and, in some cases, to save money as well. But those planners who have the time and skills to put together their own air packages should not be prohibited from realizing the potential benefits suggested by the CAB decision. If the airlines decide it is smart business to set up alternative distribution outlets, everyone will benefit, including innovative travel agents who can respond to competitive pressures.

After 40 years of protection from competition, you can't expect travel agents to give up their exclusivity without a fight. But H.R. 2053 is clearly special interest legislation that, if passed, will represent a form of airline re-regulation.

Mr. MINETA. Thank you very much. We have a call of the House for a vote, and so we will go ahead.

Mr. ANDERSON. Is Mr. Crump going to leave right away?

Mr. MINETA. I am not really sure.

Mr. CRUMP. Yes.

Mr. ANDERSON. Before you leave, Mr. Crump, you stressed the fact that you represent over 8,000 minority lawyers, jurists, scholars, and law students. I want to point out to you if you aren't aware that we have the support of the Inter-American Travel Agency Society, which is an association of black travel agents. We have the U.S. Conference of Black Mayors, Julian Dixon, the chairman of the Congressional Black Caucus, plus many other Members have already cosponsored the bill. So I want you to know that there are at least two points of view on this bill.

Mr. CRUMP. We believe in the adversary process.

Mr. ANDERSON. Very good. OK.

[Recess.]

Mr. MINETA. The subcommittee will please come to order, and Mr. Duggan will go ahead and give his statement.

Mr. DUGGAN. I very much appreciate the opportunity to be here to discuss H.R. 2053, the Air Travelers' Security Act of 1983—a cute title for a piece of legislation that no consumer advocacy group has spent 10 cents to support. And in light of the gentleman testifying before me, that 27 tourism organizations support the legislation, I dare say that not one of them is an organization made up of consumers. Those organizations all need to have the travel agency system.

Airline deregulation and its full potential will never be realized if this piece of special interest legislation beneficial to the travel agent community almost exclusively is passed.

Groups such as the National Pest Control Association that create business for the travel and hospitality industry have an economic stake in a totally free market for airline services including the ability to not only handle all negotiations with the airlines, but also to receive commissions or further concessions in lieu of commissions.

We create the convention and meeting business—travel agents do not. They, because of their unique, protected position, can reap the rewards of what we create.

After saying all that, I want to state that I use travel agents. As a matter of fact, I am on my fourth travel agency in four years. For the most part, our postconvention tours are negotiated by me personally. I arrange with the hotels and the air carrier to set up the trip. After the negotiations have been concluded, I turn the business over to the travel agent. He gets paid; I don't.

Three years ago, a large local travel agent made a pitch for our convention business going to Los Angeles, roughly 2,000 people. When asked if they had a toll-free 800 number, they replied that they didn't need one. Our group would use the American Airlines 800 number and with a numerical code, the reservation would be made by American and the travel agent would receive a printout weekly from which to issue the tickets.

Now I ask you: Do I need this type of travel agent service? As a matter of fact, on that one point, to reconfirm that, I called American Airlines, the convention office in Washington last Friday, and the same thing exists today that they are so beholding to the travel agents that even if I negotiated a straight deal with them, the travel agents could still pick up the commissions, and they did the work.

I was quoted in the Travel Agent on August 1. The attached letter from Modern Travel Service, dated August 1, 1983, was written in response to a quote of mine in the Travel Agent a travel trade publication. Prior to August 1, 1983, I had no knowledge of Modern Travel Service.

As you can see, Mr. Joel Timmel says he is in full agreement with my views regarding not extending antitrust immunity to travel agents. His reasons for agreeing that travel agents don't need antitrust immunity are totally different from mine. This is great; he feels he has a superior service and that he can do more and get more for a lower cost than I can without antitrust immunity. This man will thrive in a competitive market situation.

It was nice to see Mr. Brown refer to my printed testimony before I got a chance to read it.

Testimony was given on this subject before the Senate on October 4, 1983 by a vice president of AAA. He made a strong case for travel agents and their unique service. He stated that they perform at little cost and few complaints from the public and citing the number of complaints that the CAB had received in the course of one year. I said 120, and it was actually 113. At any rate, I will correct that and say 113 complaints.

The better business bureau paints a different picture. BBB ranks 82 industry groups in order of complaints received. We all know and have had experience with credit card problems from department stores or banks, et cetera. Credit card companies rank 36th. Travel agents rank 37. I know there isn't anybody who has credit cards today that hasn't experienced problems of one sort or another, and I guess the number of complaints is tremendous.

The better business bureau would not give me a rundown of the total number of complaints or the nature of those complaints. Again, I think we are talking about the total service rendered by a travel agent, but they rank very, very high in industry complaints. As I said, I am on my fourth travel agent in 4 years and it is not because they rendered good or superior service.

One of those agents was bragging last year about making airline reservations to Tokyo for 16 doctors attending a medical meeting. He only wrote the tickets. They went first class; his commission was $16,000. Japan Air Lines paid him a 40-percent commission. I think that was pretty high, and for the service rendered, he was grossly overpaid.

The gentleman from AAA said in previous testimony that unless travel agents are granted antitrust immunity, the AAA would not be a party to the area settlement agreement from that point forward. I just wish Congress would not pass H.R. 2053. Wild horses couldn't keep AAA out of the area settlement agreement. There is just too much money involved.

This bill is not in the public interest. Twenty-two thousand plus travel agents spreading great amounts of money are trying to perpetuate a system from which they are the primary beneficiary. Their stranglehold on the distribution system should not be allowed to continue.

Travel agents in local communities will not be run out of business. This is a service industry and agents like Modern Travel Service will not only survive but will prosper and we will all benefit.

Mr. Chairman, committee members, I thank you for your time.

One other comment that I have added to my testimony regarding Continental Airlines. My convention begins in Washington on Sunday, November 6. On Monday of this week I received written notice of cancellation of three people from Oklahoma due to their having tickets on Continental and losing their money, so they had to cancel out coming to the Washington convention.

As one of the gentlemen earlier testified that the travel agent industry has gone to bat and put up a great deal of money to take care of their customers, in this instance, this individual has not been given alternative arrangements by his travel agent.

That would conclude my remarks at this point, sir.

Mr. MINETA. Thank you very much, Mr. Duggan.

It is my understanding that since the CAB maximum tariff rules were issued 2 years ago, large volume ticket purchasers, such as corporations or trade associations, have been free to negotiate lower fares with the airlines and, as you say in your testimony, this is happening in the convention business.

Can you describe some of the other innovations you might expect to benefit from as airline ticket marketing and distribution is further deregulated?

Mr. DUGGAN. Well, I think one thing that could be done is that if the airline today were to give us a group fare, which, say, we have got from United and Eastern Airlines of 30 percent, in addition to that there is a 10-percent agency commission paid. It would be in the airlines' best interest, as I mentioned in the case of American, if we had an arrangement with American, they will still do all of the work and let the agent do the issuance of the tickets, and the agent will receive the full 10 percent commission.

If we have got our people calling in on that 800 number with a certain code that identifies them with our group, why couldn't American go and issue that ticket at an additional 5-percent discount or come up with a 5-percent rebate, say, to the association for promotional purposes for that meeting. They are still doing the work, but, as I said, I checked with the convention manager for American on Friday, and they would do all of the work and the agent would still be able to pick up the commission.

I don't think that because they are in a sacred cow position that they ought to be allowed to do that. They don't have anything to do with our business.

Mr. RAUTER. Mr. Chairman, could I add to that response?

Mr. MINETA. Yes.

Mr. RAUTER. I think the airlines naturally know their bottom line when negotiating with a particular convention group, and most convention fares were designed to be ticketable or bookable through either the convention attendee individually or a travel agent or the convention attendee's individual travel agent.

So there is that 10 percent commission that is going to be paid on a good proportion of tickets that were written for a given convention, and the airlines know that and that naturally affects their ability to negotiate. They can only go so low.

I think one of the most provocative opportunities suggested by the CAB decision would be that individual associations would take over the ticketing and reservation function themselves either as a member service or as a source of meeting related revenue and would handle attendees' individual reservations, distribute the tickets themselves and somehow, as I noted in my testimony, get some form of remuneration, either through a commission or through further discounts to prop up attendance.

Many associations rely on their annual conventions and their meeting programs as a source of revenue, as well as a member service, and I think that is one very real possibility that is suggested by this decision. Whether or not the airlines choose to do that will remain to be seen.

I think the point that both Marty and I are trying to make is that such potential innovations shouldn't be prohibited through legislation.

Mr. MINETA. Mr. Duggan, you mention that you are now on your fourth travel agent in as many years. Why do you use a travel agent? You say you make all the arrangements, and then you go to the travel agent. Do the airlines and the hotels insist on this? Is there an incentive for you to do this? What is it?

Mr. DUGGAN. The first year I did this, Mr. Mineta, it was required that we have a travel agent and we have a ground package. We, at that point, had a convention in New Orleans, and we were running a postconvention trip into Cancun and in order to get the ITC, or whatever the international fare thing was, we had to have a travel agent.

Mr. MINETA. And subsequent to that time?

Mr. DUGGAN. Well, that phase of it, I wasn't aware that that had really changed, that I didn't need a travel agent in order to handle it, but when we get down to, as we are today, 2 weeks away from the convention, the amount of detail work and things are kind of coming in on top of us at this point, so we have got an awful lot to do, and it is not an added burden that we are prepared to take care of at this point.

Again, if the money was there and we had people on staff to be able to handle these things, or the alternative could be cooperative where a number of trade associations get together. We have got meetings at different times of the year. We all negotiate with the airlines and come up with something that would support our own system and benefit our own membership and not just the travel agents, I say, who don't do anything to create this business.

Mr. MINETA. Mr. Rauter, you suggest that some convention groups may benefit from the creation of discount travel retailers and they would be the ones who could charge customers only for the services that they require. Now other witnesses have expressed a concern that if nonaccredited agents, such as discount ticket brokers, were to get into the business of selling airline tickets that the public could be easily misled or hoodwinked.

Is there a concern that you would have if nonaccredited discount ticket brokers came into the air transportation business?

Mr. RAUTER. If I was a meeting planner, I would certainly want to be sure that the tickets I purchased for my convention would be honored at the time of travel. However, with the travel industry, I don't think it is the kind of situation where you have to worry about the quality or the character of the individual from which you are buying your tickets. I think that air tickets are not all that much different than footwear or hotdogs or any number of commodities that we purchase in that we know what we want. We agree on a price. We buy that.

If a meeting planner has a good deal of travel expertise, he may not necessarily need the counseling that a travel agent could deliver to put together his or her air package. And if there are such retail outlets that can operate below the 10-percent commission based on minimal services required by the client, I wouldn't think it unreasonable for a meeting planner to walk in to such an outlet and say "I have 30 percent of my people coming from New York and 20 percent from Los Angeles and the remainder from the Midwest. This is what I need. Please ticket this group."

I don't think that requires a whole lot of work on that retail outlet's part and as Marty pointed out, quite often travel agents are handed fairly substantial pieces of group business that really do not require anything other than writing and distributing the tickets. I think this kind of situation could be very beneficial to meeting planners and meeting travelers, particularly for smaller associations and smaller groups who may not have the buying clout to merit the kind of discounts that I refer to in my testimony.

The airlines today have limited convention sales forces, and they can only spread their time among so many groups, and quite often the smaller groups are denied discounts simply because the airlines do not have time to sit down and negotiate with them or they do not think that the size of that business necessarily merits a special fare.

But I think that the potential for the development of discount ticket brokers could be a benefit to these smaller groups who don't otherwise merit special fares.

Mr. MINETA. I have said earlier that H.R. 2053 would prohibit a travel agent setting up a temporary location to write tickets at a convention or meeting site. Do you believe this would be a beneficial service to meeting and convention goers to have a travel agent setting up a temporary location to write tickets at a convention site?

Mr. RAUTER. I suppose that is definitely a benefit. Anything that enhances the convenience of travel for a convention attendee is certainly going to be viewed as a benefit from the meeting planner's point of view.

My original thrust in terms of using such equipment in places other than travel agent offices would be within the association's own offices whereby the association would perhaps be designated as an online agent for its official carrier and would handle the reservations, handle the ticketing, and distribute those tickets along with the usual preconvention materials relating to convention events, registration packages, agendas, et cetera.

So, yes, that would clearly be a benefit without a doubt.

Mr. DUGGAN. I will just add what I think about it. We wouldn't need a travel agent onsite because at that point in time the people have already made their plans. So when the people come here in 2 weeks for the convention at the Sheraton, Washington, they will have already completed their plans for arriving and departing; so unless there were, say, some kind of chaotic situation where two airlines go bankrupt and you need somebody to reroute them or something like that, but the way things would normally be at any convention, I couldn't see it as being an advantage of ours.

Mr. MINETA. Now, other aspects of the travel industry, other than airlines, do not receive antitrust immunity to establish an industrywide system of agents. I am thinking of hotels, tour operators, car rentals, et cetera. As convention and meeting planners, you do business with all these people.

Do you see anything inherently different about the airline business as opposed to the hotel industry or car rental industry that requires a broad grant of antitrust immunity to the agency system?

Mr. DUGGAN. No, sir.

Mr. RAUTER. I don't see anything of that sort either. I have been watching this case for a while now and reading much of the testimony that has appeared before you, and it seems to me that the airlines are different in that they do require this nationwide distribution network of agents who can sell everyone's product, and I think that interlining of two or more carriers is very, very important to the meeting and convention community.

However, I have not been convinced. I have not seen a piece of evidence that suggests that we would lose those benefits of the air traffic conference were other channels to be opened to competition.

Mr. DUGGAN. My understanding of the antitrust immunity is that if the airlines or the travel agents acting in concert were to do something that would be anticompetitive, that their antitrust immunity would not be valid. And I think that is the bottom line, that whatever they are doing, if it were of an anticompetitive nature, it would be a subject of the antitrust rules and regulations with or without antitrust immunity.

And ıf that is the big thing that they are afraid to, as the gentleman from triple A testified earlier, that the airlines meeting and discussing their operations, they can do that as long as the things that they are doing and discussing are not anticompetitive. They do not reduce competition.

Mr. MINETA. Mr. Anderson?

Mr. ANDERSON. I don't really have any questions.

Marty, just a little more knowledge on how you do this convention business.

Now, you related about the National Pest Control conventions that you deal directly then with the airline and you secure for your people and your association a 30-percent discount; is that it?

Mr. DUGGAN. Correct.

Mr. ANDERSON. That is for the people who attend your convention.

Then you don't get anything in addition to that, anything for you has to come out of that 30 percent back from the association, I assume, and yet you had to place it through a travel agent who got an additional 10 percent, was that it?

Mr. DUGGAN. Well, the travel agent does, on top of the discount of 30 percent, the travel agent does get 10 percent.

Mr. ANDERSON. Well, why wouldn't you have placed that directly with the airline? I would have thought if you negotiated with the airline and got yourself a 30 percent discount that you would place your purchase with the airline directly.

Mr. DUGGAN. Mr. Anderson, the testimony that has gone down here before, I just don't believe that the travel agents don't have a stranglehold on these people.

Mr. ANDERSON. That is not my question. My question is that you must have negotiated this 30-percent discount with Eastern or American or whoever it was. Why then didn't you buy your tickets from the airline directly?

Mr. **Duggan**. Two reasons: No 1, I have got a postconvention tour. It is a little more complicated and I can't handle the ticketing, so I have to, in this instance, use a travel agent. I have got two airlines involved in our convention, Eastern Air Lines and United, both of them offering discounts.

I only get 30 percent or my people only get 30 percent from Eastern Air Lines. On the United Air Lines, we go through on a local major travel agent that in addition to the 30 percent, they get less $15. So our people are getting 30 percent less $15.

Now, that is something the airline will not give to me, or, as far as I know, any other convention group directly. There are six or seven major travel agents throughout the country that presently have that kind of an arrangement with United.

Mr. **Anderson**. Are there other groups that get more or less than 30 percent from the airlines?

Mr. **Duggan**. Yes; John Crump, if he were sitting here, John Crump, as we were talking about, he got 30 percent less $10. My group gets $15 and there are other groups that get $20.

Mr. **Anderson**. Where does the $10 and the $15 and the $20 go?

Mr. **Duggan**. I guess it depends on the size or the potential of that particular group.

Mr. **Rauter**. Excuse me, Congressman Anderson. I think it also relates to the time of travel and the ability of the convention to deliver incremental traffic to the airline. If a group can come in at a time that is particularly slow, travel in the middle of the week or travel during off-season, there are some substantial savings there as well.

Mr. **Anderson**. You mentioned Cancun. You don't go to Cancun at the wrong time of the season. You would not probably go to Cancun during the best time, I would think. You would not go there during the off-season?

Mr. **Duggan**. We went in November. It is not necessarily the in-season. The in-season down there would start probably in the middle of December. But it just happened that it coincided with our convention dates that they were opening a new hotel down there.

And as a side note as to why we would go there, at the time if you were coming out of New York City and going to New Orleans for our convention, it would have cost you $354 round trip. If you were going to Cancun with a layover in New Orleans, for the convention it was $225. It was $134 less if you went on to Cancun.

I have got people in 2 weeks traveling down to Bermuda round trip to Atlanta and Bermuda back to Atlanta is $343. So the international, it just so happened that it was an attractive proposition to book that piece of business because of the international air fares coming into effect.

If I can, I would like to elaborate. I had four people coming from—one of our members out of San Diego going to Cancun, but they had to come into New Orleans for the convention and the guy happened to be on our board. We had a board meeting in April or July. Anyhow, for some reason or other, the question came up and he told me what he was paying in fares and I said, "When I get back to the office, I would like you to send me a copy of your ticket."

Well, the travel agent, he should have been getting the international fares. They had him flying directly out of San Diego into New Orleans and then on down to Cancun. They had him coming out of San Diego on Continental. I had him change his reservations and go into Los Angeles and get Eastern Air Lines. It took him a little over 3 hours' extra traveltime and between the four of them, they saved over $1,200.

That same couple is going to Bermuda in 2 weeks and they are flying first class. All the agent did, I made the reservations or handled the negotiations with the hotel and the block of rooms and so forth with the airline for the block of seats. They are handling the ticket operation. That one couple is paying in excess of $400 in commissions and that just involves the air travel and ground package in Bermuda. That does not have anything to do with the Washington package.

As a meeting planner, what I am trying to do is either be able to offer our members more benefits or get them reduced prices for whatever they are doing. I thought I did a great deal. The going rate at the hotel down in Bermuda is $165 a day, which is the modified American plan. I got it down to $150. Off of that, I could not get it. I am not eligible. But the travel agent is getting 10 percent at least off that as a commission.

Mr. ANDERSON. Thank you, Mr. Chairman.

Mr. MINETA. Thank you very much, Mr. Anderson.

Mr. Duggan and Mr. Rauter, thank you very much for your testimony and help before the subcommittee.

Mr. DUGGAN. Thank you, sir.

Mr. MINETA. Now we would like to call Mr. William E. Oakes, vice president of marketing, Republic Airlines.

Mr. Oakes, you have been patient in waiting this long. I appreciate it very much. Your statement will be made a part of the record.

[Statement referred to follows:]

STATEMENT OF WILLIAM E. OAKES, VICE PRESIDENT-MARKETING, REPUBLIC AIRLINES, INC.

Mr. Chairman and Members of the Subcommittee: Thank you for the opportunity to appear today on behalf of Republic Airlines and in support of the more than 20,000 full-service travel agents.

I must begin by admitting to a bias on the part of Republic. We are committed to the proposition that a nationwide, neutral system of retail distribution is absolutely essential to a competitive air transportation industry. It is a bias based on experience. I vividly recall the late 1960's and early 1970's when, with the widespread introduction of jet equipment, domestic air transportation mushroomed and traffic more than doubled in only five years. Jets made that growth possible, but what made it happen was the fact that a nationwide, neutral system of retail distribution was already in place—and that system was the network of ATC-accredited agents. I was with Southern Airways at the time, a small local service carrier that as late as 1965 was still boarding only 800,000 people per year. Yet by 1972, we were boarding over 2 million people per year, in large part because travel agents all over the country were not only able to sell our tickets, they had no reason not to sell our tickets if we offered the prospective passenger the best service at the best price.

Republic has had precisely the same experience. When Dan May, Republic's President and CEO, testified before the Subcommittee in June, he pointed out that Republic has accounted for the lion's share of new entry in domestic markets since deregulation. As one of the persons responsible for selling that new entry to the public, and it amounted to millions of seats annually in more than seven dozen nonstop markets, I can assure you that access to a neutral system of retail distribution was essential. Even the "new entrant" airline that offer the simplest form of air transportation, point-to-point no frills service in dense markets, soon find that they, too, require access to this distribution system.

The reason that this system has become so essential is simple. While competition in a deregulated industry might work if all other things were equal, most things in this industry are not equal. There are too many carryovers from the days of regulation, including great disparities in the size and market position of airlines. The fact remains that the closest thing to a level playing field still remaining in this industry is the full service travel agent, and the future of that individual agent is the future of this industry.

There are two threats to that future, and they threaten competition as much as they threaten individual airlines. The CAB's decision in the Competitive Marketing Investigation is the first threat, followed closely and inevitably by the growth of computer reservations systems dominated by the largest airlines. I am not going to spend much time on the latter since it is the subject of detailed investigation in other forums, but it must be recognized that the two are interrelated and I will address that point. Let me begin, however, by discussing Republic's legal challenge to the CAB's decision.

REPUBLIC V. CIVIL AERONAUTICS BOARD

As you are aware, Republic felt so strong about the injustice to travel agents and potential damage to competition caused by the CAB's decision that it initiated the appeal of that decision, an appeal joined in by a number of other parties including the Air Traffic Conference, ASTA, IATA, and ARTA. Our legal briefs were filed with the Eighth Circuit Court of Appeals on October 3, and I am told that the CAB's legal brief is due in mid-November.

I am not a lawyer, but my understanding of the case is this. Any airline may submit an interairline agreement to the CAB if it wants to obtain antitrust immunity for that agreement. If it does not want immunity, it does not have to submit anything and there is no role for the CAB. Under the authority you have given to the CAB, once an agreement is submitted it must be reviewed very carefully in accordance with strict antitrust standards. If the facts demonstrate that the agreement does not meet those standards, it must be disapproved and no immunity is granted. If the facts demonstrate compliance with the standards, approval and immunity should be forthcoming. Keeping in mind the policy objective of preserving those interairline agreements which are pro-competitive while minimizing governmental interference, this appears to be a fairly common-sense approach.

The CAB, as I understand it, has attempted to carve out a middle ground where even though the facts may demonstrate compliance with the antitrust standards, it does not have to grant antitrust immunity. Again, I am not a lawyer, but that view simply does not make any sense. Why go through all the trouble and expense of investigating the agreements if the decision on the last day to grant or deny antitrust immunity--and the prospect of immunity is the only reason agreements are filed in the first place—is a "ball or strike" call by the CAB?

In the Competitive Marketing Investigation, the CAB exhaustively reviewed all of the facts, was unable to find that the basic agreements were anticompetitive, yet still called it a "strike". When you read the CAB decision, it is clear that the only two factors the ATC agency system had going against it, and these factors proved to be fatal, were that: (1) it was thought up by the airlines; and (2) it predated deregulation. If the ATC agency system had not existed and, instead, had been created by the current CAB—and the factual basis for such an action rest in the decision—that action would be hailed as a triumph of deregulation.

I will leave *Republic* v. *CAB* by noting that while our lawyers are optimistic, it is hardly a certainty that the CAB's decision will be overturned. Even if it is overturned, that process will take time and, I am advised, there is always the possibility that the case will be remanded to a hostile agency. In other words, the merits of the appeal aside, there is a continuing need for legislative relief.

POLICY QUESTIONS

Focusing now on the policy questions, those defending the CAB's decision make two general arguments. First, they argue that the practical effect may be little change to the current system so, therefore, there is no cause for concern. Secondly, they argue that if there are changes, even though they cannot predict what those changes will be they will all be for the better. Neither argument has merit.

1. If it is really possible that the Competitive Marketing Investigation will have no material effect on the existing distribution system, then why run the risk that it will? The argument that a regulation is unnecessary because the status quo will

result in any event makes sense only if the regulation is burdensome and the maintenance of the status quo is a certainty. Neither is the case here. Antitrust immunity is not a form of regulation—it is deregulation in form and substance, a distinction the CAB seems incapable of appreciating.

Similarly, the continuation of the existing distribution system is hardly a certainty absent antitrust immunity. There was substantial testimony on this point before the CAB, and I would only add a personal note. As of January 1, 1985, I and my fellow officers will personally be liable under the antitrust laws, including their criminal provisions, for interairline activity that presently accounts for over 65% of Republic's sales. I frankly do not care if the consensus is that I will eventually prevail in any case that would be brought against me. It is the exposure and the risk that will concern every airline official, and I would suspect that the present agency system would disappear fairly quickly under the cloud of antitrust uncertainty.

2. As to alternatives to the present system, neither the CAB nor the Department of Justice nor any other party could really come up with one. The only, and I emphasize only, company that has arguably been excluded from the present system is Ticketron, and even it would be accommodated by Judge Yoder's decision. There is little doubt in my mind, however, about the alternative that would replace the present distribution system, and if you want to see it just go to a travel agency that has an Apollo or Sabre CRT.

The Big Four carriers, and particularly American and United, came into deregulation with the twin advantages of size and market power. Their marketing strategy reflects those advantages, and that strategy is to dominate the points of sale for air transportation. Absent a system of route regulation, the very large carriers have absolutely no long term interest in a neutral distribution system since such a system would also sell the services of their competitors. They want control, they require control and they will get it if two things happen. First, they have to have physical control of each sale, and they have already reached that point through their computerized reservations systems. Secondly, there has to be some outside impetus for the existing distribution system to break down, and the Board's decision is the leading candidate for that role.

In other words, the ATC agency agreements are the last remaining bit of glue holding together the neutral retail distribution system that has so greatly benefitted competition in the past. When, and if, it disappears, the distribution system is quickly going to fragment into smaller systems controlled by the computers of the largest airlines. There will be far fewer travel agents in those systems, (probably less than half of the present number), and those remaining will be reduced to the role of franchised distribution centers for the Big Four (or, perhaps, the Big Two or Three). That is the brave new world that the CAB would have us look forward to as a result of the Competitive Marketing Investigation.

CONCLUSION

It is very easy to undo things in the name of deregulation. At the same time, it is almost impossible to put things back together again. The CAB's decision is a theoretical music box, with all of the parts turning together to produce one theme, deregulation, which the CAB believes the Congress likes to hear. But how is that music box going to sound five years from now when we are down to only a few thousand travel agents, all of whom are controlled by one of the largest carriers, no other airline can compete effectively against their absolute control of the distribution system, and the public is screaming about high fares, poor service and the other symptoms of reduced competition?

As I indicated earlier, Republic believes that the CAB has done a grave injustice to the more than 20,000 full service travel agents in this country. We will also admit to self-interest, because our future is largely their future. But the reason Congress should act goes beyond those interests. You should act because the CAB's decision in the Competitive Marketing Investigation will, unless overturned by the courts or by Congress, otherwise prove to be one of the most anticompetitive and anticonsumer actions in recent memory—and by the time that has become fully apparent, it will be too late to repair the damage.

Thank you again for the opportunity to appear, and I would be delighted to answer any questions you might have.

Mr. MINETA. Please proceed.

TESTIMONY OF WILLIAM E. OAKES, VICE PRESIDENT, MARKETING, REPUBLIC AIRLINES, INC., ACCOMPANIED BY TRAVIS L. TANNER, JR., DIRECTOR OF AGENCY MATTERS, AND FRANK J. COSTELLO, LEGAL COUNSEL

Mr. OAKES. Mr. Chairman and members of the committee, I am Bill Oakes, vice president of marketing for Republic Airlines and I am accompanied today by Mr. Travis L. Tanner, our director of agency matters, and Frank Costello, our legal counsel.

We appreciate this opportunity to give you our thoughts on the travel agency system. I have submitted a written statement for the record and, with your permission, I will just touch on some of the points in that statement.

We at Republic are committed to the proposition that a nationwide mutual system of retail distribution is absolutely essential to a competitive air transportation industry. It is a bias based on experience.

I vividly recall the late 1970's when the widespread introduction of domestic air transportation mushroomed and traffic more than doubled in 5 years. Jets made that growth possible, but what made it happen was the fact that a nationwide mutual system of refill distribution was already in place. That system was the network of ATC-accredited agents.

Republic has had precisely the same experience. When Dan May, Republic's president and chief executive officer, testified before the subcommittee in June, he pointed out that Republic has accounted for the lion's share of new entry and domestic markets since deregulation. I can assure you that access to a neutral system of retail distribution was essential.

Even the new entrant airlines that offer the simplest form of air transportation point-to-point, no-frills service and dense markets soon find that they too require access to this distribution system.

The reason that this system has become so essential is simple. While competition in a deregulated industry might work if all other things are equal, most things in this industry are not equal. There are too many carryovers from the days of regulation, including great disparities and the size of market position of airlines.

The fact remains that the closest thing to a level playing field still remaining in this industry is the full-service travel agent and the future of that individual agent is the future of this industry.

There are two threats to that future and they threaten competition as much as they threaten individual airlines. The CAB's decision and the competitive marketing investigation is the first threat, followed closely and inevitably by the growth of computer reservation systems dominated by the largest airlines.

Let me begin, however, by discussing Republic's legal challenge to the CAB's decision. As you are aware, Republic felt so strongly about the injustice to travel agents and potential damage to competition by the CAB's decision that it initiated the appeal of that decision, an appeal joined in by a number of other parties including the Air Traffic Conference, ASTA, and ARTA.

Our legal briefs were filed with the Eighth Circuit Court of Appeals on October 3. I am told that the CAB's legal brief is due in mid-November.

The CAB, as I understand it, has attempted to carve out a middle legal ground where even though the facts may demonstrate compliance with the antitrust standards, it does not have to grant antitrust immunity. I am not a lawyer but that view simply does not make any sense.

Why go through all the trouble and expense of investigating the agreements if the decision on the last day to grant or deny antitrust immunity and the prospect of immunity is the only reason agreements are filed in the first place? Is a ball or strike called by the CAB?

In the competitive-marketing investigation the CAB exhaustively reviewed all of the facts and was unable to find that the basic agreements were anticompetitive, yet still called it a strike. When you read the CAB decision it is clear that the only two factors the ATC agency system had going against it, and these factors proved to be fatal, were that, first, it was thought up by the airlines; and, second, it predated deregulation.

I will leave *Republic* v. *CAB* by noting that while our lawyers are optimistic, it is hardly a certainty that the CAB's decision will be overturned. Even if it is overturned, that process will take time, and I am advised there is always the possibility that the case will be remanded to a hostile agency. In other words, the merits of the appeal aside, there is a continuing need for legislative relief.

Focusing now on the policy questions, those defending the CAB's decision make two general arguments. First, they argue that the practical effect may be little change to the current system, so that therefore there is no cause for concern. Second, they argue that if there are changes, even though they cannot predict what those changes will be, they will all be for the better. Neither argument has merit.

If it is really possible that the competitive marketing investigation will have no material effect on the existing distribution system, then why run the risk that it will. The argument that a regulation is unnecessary because the status quo will result in any event makes sense only if the regulation is burdensome and the maintenance of the status quo is a certainty. Neither is the case here. Antitrust immunity is not a form of regulation—it is deregulation in form and substance, a distinction the CAB seems incapable of appreciating.

Similarly, the continuation of the existing distribution system is hardly a certainty absent antitrust immunity. There was substantial testimony on this point before the CAB, and I would only add a personal note. As of January 1, 1985, I and my fellow officers will personally be liable under the antitrust laws, including their criminal provisions, for interairline activity that presently accounts for over 65 percent of Republic's sales. I frankly do not care if the consensus is that I will eventually prevail in any case that would be brought against me. It is the exposure and the risk that will concern every airline official, and I would suspect that the present agency system would disappear fairly quickly under the cloud of antitrust uncertainty.

As to alternatives to the present system, neither the CAB nor the Department of Justice nor any other party could really come up with one. The only, and I emphasize only, company that has arguably been excluded from the present system is Ticketron, and even it would be accommodated by Judge Yoder's decision. There is little doubt in my mind, however, about the alternative that would replace the present distribution system, and if you want to see it, just go to a travel agency that has an Apollo or Sabre CRT.

The big four carriers, and particularly American and United, came into deregulation with the twin advantages of size and market power. Their market strategy reflects those advantages, and that strategy is to dominate the points of sale for air transportation. Absent a system of route regulation, the very large carriers have absolutely no long-term interest in a neutral distribution system, since such a system would also sell the services of their competitors. They want control, they require control, and they will get it if two things happen. First, they have to have physical control of each sale, and they have already reached that point through their computerized reservation systems. Second, there has to be some outside impetus for the existing distribution system to break down, and the Board's decision is the leading candidate for that role.

In other words, the ATC agency agreements are the last remaining bit of glue holding together the mutual retail distribution system that has so greatly benefited competition in the past. When and if it disappears, the distribution system is quickly going to fragment into smaller systems controlled by the computers of the largest airlines. There will be far fewer travel agents in those systems—probably less than half of the present number—and those remaining will be reduced to the role of franchised distribution centers for the big four or, perhaps, the big two or three.

As I indicated at the outset, the public believes that the CAB has done a grave injustice to the more than 20,000 full-service travel agents in this country. We will also admit to self-interest, because our future is largely their future, but the reason Congress should act goes beyond those interests. You should act because the CAB's decision in the competitive marketing investigation will, unless overturned by the courts or by Congress, otherwise prove to be one of the most anticompetitive and anticonsumer actions in recent memory. And by the time that has become fully apparent it will be too late to repair the damage.

Thank you again for the opportunity to appear, and we will be delighted to answer any questions you may have.

Mr. MINETA. Thank you very much, Mr. Oakes. Now in earlier testimony we heard of the financial difficulties of Republic Airlines. Could you tell us approximately how much a year is spent on commissions to travel agents?

Mr. OAKES. Our annual passenger revenue for 1982 was approximately $1.6 billion, and it was somewhat less than $160 million, since our percentage of commission is slightly less than 10 percent. And I would have to take a percentage of that since the latest figures I have of passenger revenues generated through travel agents is approximately 70 percent in the month of September, so it would be about 70 percent of $160 million.

Mr. MINETA. Now, is it not true that under the current ATC system there are no realistic opportunities to reduce commissions, while under the CAB's decision there would be opportunities for airlines to explore ways of setting up the less expensive arrangements with non-ATC agents or other distributors? Would it not be in Republic's interest to have a system where it might be able to reduce its commission costs?

Mr. **Oakes**. I think the danger there, Mr. Chairman, is not with the travel agents themselves but rather with our competing air carriers. We must remain competitive on our percentage commission to travel agents or any distribution form that we might have, and since we are not one of the haves in terms of the highly developed computerized reservation systems, I do not believe there would be an alternative form of distribution that would be viable in this competitive environment.

Mr. **Mineta**. On page 6 of your testimony you suggest that without the antitrust immunity the present agency and interline systems would disappear because you and other airline officials would be personally liable under antitrust laws. I understand that there are a number of joint airline activities such as the airline clearinghouse, the universal air travel plan, and the clearinghouse for spare parts which currently operate without antitrust immunity. Have you or your fellow officers been concerned about your personal liability for activities in connection with these agreements, and how would you distinguish these agreements from the area settlement plan and the interline agreements?

Mr. **Oakes**. Well, I have certain comments regarding some of those. I would invite my attorney, Mr. Costello, to join me in answering some of those, Mr. Mineta, but generally speaking, those types of arrangements are one-on-one relationships and are not of the nature that we are speaking of here with regard to the ATC agreements relating to interairline travel and ticketing, but I would ask Mr. Costello to add to that.

Mr. **Mineta**. When you say one on one, I thought those were all industrywide agreements, though.

Mr. **Oakes**. Yes, sir; they are, but, for example, in the airline clearinghouse the actual transaction generally is a form of payment from one airline to the other. That is simply agreed to among us.

Mr. **Costello**. Mr. Mineta, if I might address that in answering your second question, I think there has been a concern about all of those, and we have probably given an opinion in the antitrust context on each one. The difference between these type of agreements and the limited purpose joint venture is that these are agreements that only affect the participants to them. The airline clearinghouse is nothing but an accounting arrangement between the airlines who participate and the banks. It does not affect third parties. That is really true of the spare-parts clearinghouse and similar pooling arrangements. There is an awful lot of pooling that goes on in the industry. The universal air travel plan at one time had visions of becoming something more than just an agreement that only affects its members. They had plans for becoming a general purpose credit card. Those plans, of course, were destroyed when the CAB removed antitrust immunity from it and the universal air travel plan today really had been quite a disappointment as I understand it to all the participants in it because they really cannot do what they would like to do. So those are substantially different types of arrangements.

Mr. **Mineta**. When you have those problems do you have industrywide meetings to try to talk them out and iron out some of those problems?

Mr. **Costello**. For the most part I believe so. I believe for the most part they are run by professional staffs and there are not all that many policy questions involved in them. These are almost bookkeeping arrangements. They are not the type of limited purpose joint ventures that the accreditation program involves, and you do not have to look just in the airline industry. You can look in most industries and find things similar to this.

Mr. **Mineta**. As I understand it, your position is that antitrust immunity is needed to insure that the ATC system survives. What about exclusivity? Is it also necessary for the survival of the system that the airlines agree that they will only use those agents who meet ATC standards? Do you see any problems with the system in which there is antitrust immunity for common standards of accreditation and the area settlement plan, but the airlines are free to use other agents?

Mr. **Oakes**. My comment with regard to that relating to interline airline activity, I think airlines would have the ability to appoint on an individual basis any agent it so chose as long as it was for online travel only, with no regard to the damage of the ATC system. But with regard to interairline activity I believe the system as it has developed is the most efficient that could be developed.

Mr. **Mineta**. Along the same lines, is it necessary or desirable to have antitrust immunity for a rule on how an agent does business such as a rule that an agency office must be kept open 35 hours a week?

Mr. **Oakes**. Well, I think those rules, sir, can be developed within the ATC conference itself. Those are changes that do occur through the vote procedure, at least so far as I understand it, have no bearing whatsoever on the desire to grant, to retain immunity in order to have those types of agreements, conferences to develop those agreements or rules.

Mr. **Tanner**. May I make a comment on that?

Mr. **Mineta**. Surely, Mr. Tanner.

Mr. **Tanner**. The one thing that is happening with the evolution of the rules that lead to accreditation and so forth is really that the airlines are getting together and form these so that the consumers are offered the best possible service. And it is really the effect on the consumers that we look at when we deal with these matters at an ATC conference.

Mr. **Mineta**. Thank you.

Mr. Anderson.

Mr. **Anderson**. Thank you, Mr. Chairman.

Mr. Oakes, first I want to congratulate you on an excellent statement. You indicate Republic believes that the CAB has done a grave injustice to the more than 20,000 full-service travel agents in the country, and you admit to a self-interest, because your future is largely their future you say. But the real reason Congress should act goes beyond those interests. You say we should act because CAB's decision will, unless overturned by the courts or Congress, prove to be one of the most anticompetitive and anticonsumer actions in recent memory. By the time it has become fully apparent, it will be too late to repair the damage.

You have said exactly my feelings, only you have said it so succinctly I wanted to read it back to you because I think it is an excellent, excellent statement. I wanted to congratulate you.

Mr. OAKES. Thank you, sir.

Mr. ANDERSON. I do have a couple questions. Many of those who oppose H.R. 2053 contend that the CAB decision will lead to lower commissions to travel agents, with those savings passed along to the consumer. Do you agree with this?

Mr. OAKES. No, sir, I do not. I believe that whether this particular House bill is passed or not, if the major carriers desired and wanted lower travel agency commissions, they could do so with or without. I have seen that happen.

Mr. ANDERSON. Now, you have gone to court to fight this CAB decision. Did you choose to do so in hope of pleasing the travel agents? Or put another way, do you support H.R. 2053 out of fear of the travel agents?

Mr. OAKES. No, sir.

Mr. ANDERSON. That has been knocked around here today, at every hearing we have had.

Mr. OAKES. No, sir; we support it because of the competing airlines, not because of the fear of travel agents.

Mr. ANDERSON. In closing, let me again congratulate you on a fine statement. As Republic is a Minnesota-based carrier, I am pleased to report that my colleagues, Representatives Oberstar, Stangeland, and Weber, all Minnesota Members and members of this committee have added their names as cosponsors of H.R. 2053.

Thank you, Mr. Chairman.

Mr. MINETA. Thank you very much, Mr. Anderson.

And Mr. Oakes, Mr. Tanner, Mr. Costello, we appreciate very much your staying until the very end to testify and to be here to enlighten the subcommittee. Thank you very much.

Mr. OAKES. Thank you, sir.

Mr. MINETA. Is there any business to come before the subcommittee? Otherwise, the subcommittee stands adjourned.

[Whereupon, at 5:36 p.m., the subcommittee was recessed, to reconvene subject to the call of the Chair.]

ADDITIONS TO THE RECORD

STATEMENT OF AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC.

The Aerospace Industries Association of America, Inc. is the national trade association representing the major domestic firms engaged in the manufacture of aircraft, spacecraft, missiles and related components and equipment. The Association takes this opportunity to comment on a matter of significant importance to its members. They have expressed serious concerns over the provisions of H.R. 2053 to rescind the order of the Civil Aeronautics Board in the Competitive Marketing Case and establish by law continued anti-trust immunity for agreements between airlines and travel agents thus removing incentives for price competition in the airline industry.

In the normal conduct of business, members of the Association make extensive use of airline service and as such have a strong interest in promoting a most efficient and responsive system for the marketing of airline tickets and, for strengthening the carrier industry through the development of viable and competitive business arrangements. The Civil Aeronautics Board decision in the Competitive Marketing Case was supportive of these goals. The bill under consideration, H.R. 2053 is not and would serve only to re-regulate the marketing of airline services.

In the Board decision which would be reversed by enactment of H.R. 2053 there essentially is four major parts. (1) Exclusivity or the singular right for travel agents to market airline tickets was disapproved for travel on one carrier and on joint service or interline ticketing as of December 31, 1984. Airlines where allowed to enter bilateral or multilateral agreements on interlining. This permitted the airline to authorize other than accredited travel agents the opportunity to market tickets at competitive prices; (2) Basic accreditation standards for travel agents would remain and could be adjusted prior to the removal of anti-trust immunity in 1984; (3) Business Travel Department restrictions would continue until December 31, 1984; and (4) Antitrust immunity conferred on today's travel agent agreement would continue for a transition period ending December 31. Thus, this decision removed barriers to the competitive marketing of air transportation tickets and provided a transition period for terminating the agreements containing "exclusivity clauses" requiring airlines to market their tickets exclusively through travel agents.

This decision which we support was consistent with the mandate of the Congress in the Airline Deregulation Act of 1978 (Public Law 95-504) which called for maximum reliance to be placed on competitive market forces to foster an efficient and well managed air carrier system. The bill H.R. 2053 would be inconsistent with this mandate and would reinstate regulatory barriers to competition which are unwarranted. The bill would convey under law, with no enabling provisions, continued antitrust immunity for travel agent agreements which serve only to inhibit competition in the marketing of airline services. We would urge your favorable consideration of our position which is consistent with the mandate of Public Law 95-504 and the Civil Aeronautics Board decision in the Competitive Marketing Case so that the benefits of competition can be maintained and extended to the users of airlines service and to the airline themselves.

STATEMENT OF THE NATIONAL TOUR ASSOCIATION, SUBMITTED BY JAMES D. SANTINI, WASHINGTON REPRESENTATIVE

Mr. Chairman and Members of the Committee: This statement is offered in support of the Travel and Tourism Government Affairs Council's endorsement of H.R. 2053, the Air Travelers Security Act of 1983. NTA is proud to be one of the 28 national travel and tourism trade associations comprising the Council's membership. NTA has actively supported the Council's programs and initiatives, and wholeheartedly concurs with the Council's position on H.R. 2053. NTA has prepared this statement for your distinguished panel to demonstrate its staunch support of this legislative initiative. It is NTA's judgment that H.R. 2053 will protect not only the travel and tourism industry as a whole, but will also address NTA's particular concerns about the serious adverse impact the decision rendered in the CAB's Competitive Marketing Investigation will have on NTA's members and clientele.

The National Tour Association is the primary tour industry in North America. NTA's membership represents over 375 tour operators who package and sell group vacations, as well as over 1,800 suppliers of travel services, such as hotels, restaurants, attractions, bus companies, sightseeing services, and other businesses. Each of these components making up our membership stands to experience serious adverse economic repercussions of the CAB marketing case decision.

NTA and every component of the travel and tourism industry will be affected by the implementation of any federal policy arising from the case. Your committee has already received voluminous documentation, in both oral and written form, substantiating the tremendous impact of the travel and tourism industry on our nation's economy. It is not necessary to belabor these statistics now. It is sufficient to emphasize that by the year 2000, travel and tourism will rank as the top U.S. industry in terms of retail sales. Within the travel and tourism industry, the group tour business, which NTA represents, is the fastest-growing segment. The financial soundness of the entities making up the NTA membership is inextricably linked to the financial soundness of the travel and tourism industry as a whole.

The existing travel agency system is a means by which the travel service providers gain immediate access to the public. Travel suppliers, including NTA members, rely on the agency system as an unbiased, common retain outlet for a full range of travel services: air, rail, boat, bus, and rental car travel; motels, hotels, camping, and other lodging facilities; attractions, food services, and other travel-related services. Almost every major segment of the travel and tourism industry uses the travel agent for the sale of its services.

The existing travel agency system responds to the traveling public's need for professional traveling assistance. At the same time, the increase in the number of travel agents vouches for the competitiveness of the system. Every year, the travel agency business has grown by approximately 10 percent.

Currently, travel agents play an important role in the marketing of group tours. Travel agents serve as a valuable link between NTA members and the travel consumer. Furthermore, NTA looks to the tremendous potential travel agents hold in the future for brokering group tours. In order for this increased role to become reality, however, public confidence in the travel agent must remain undisputed. The current system of travel agent certification ensures this. Should the vending of travel services be allowed to occur without the checks and balances of the current system, the group tour organizer will be unable to rely upon the travel vendor for credibility, accurate information, maximum dollar value, and equal treatment.

These characteristics of the services rendered to the traveling public under the current system are crucial to the NTA's clientele. The group tour is the fastest-growing segment of the travel and tourism industry today. It appeals especially to the senior citizen, the handicapped, the traveler seeking maximum value for his travel dollar, and the traveler seeking the security and reassurance of the group tour. It is precisely for this special clientele's benefit that NTA wishes to see the protections of the current system continued.

Of these specific markets, the senior citizen market makes up the lion's share of NTA's clientele. Americans aged 55 and over are perhaps the fastest-growing consumer segment today, and this market is expected to undergo a tremendous growth rate in the next 30 to 40 years.

The group tour operator must ensure that services most sought by senior citizens, i.e., convenient, worry-free, predictable travel, is delivered to them. NTA is committed to delivering this kind of service; otherwise, the senior market wiil opt to forego travel.

The dramatic growth of the group tour segment also presents a potential for an increase in intermodal group tour packages. Two examples of this are a motorcoach group tour of New England's autumn foliage and country inns that depend upon air service to bring participants from southern or western areas of the United States and a motorcoach tour of a particular region of the United States designed for foreign visitors who arrive in our country by air. The prospect for a tour package that includes a flight combined with motorcoach travel is cogent justification of the need to maintain the current distribution system. Without unquestionable reliability and service, the growth of intermodal tour packages will be stymied.

The ATC agreement is an airline and travel industry self-regulation mechanism that maintains interline agreements for ticket and baggage handling. The motorcoach tour relies on interline agreements as an essential element of the consumer convenience that the public has come to expect over the last 40 years.

To illustrate the importance of this agreement to the motorcoach tour industry, consider the impact of any alterations of interline baggage handling agreements on senior citizens. Without the guarantees of the current system, senior citizens would be forced to deal with tracking baggage through changes in interline and intermodal situations. To the consumer who has chosen group, rather than self-organized, travel in order to avoid worries of this kind, the new system would undermine the advantage of group travel. The economic impact of seniors who forgo travel because of the prospects of baggage handling problems alone is reason to question the wisdom of ending a system that currently provides assurances to the traveler.

The distribution of travel services under the current system is efficient, cost-effective, and responsive to the consumer. This system has provided a reliable supplier of tourism services to the traveling public and a means for a travel service provider to gain immediate access to the public. NTA espouses the "if it is not broken, why fix it?" attitude. In our experience, the system has proven its merit. The changes that the CAB marketing decision will usher in are untested. These adjustments will affect NTA's segment of the travel and tourism industry adversely.

Thank you for this opportunity to present our views. NTA is committed to supporting H.R. 2053 as a necessary, preventive measure against the serious threats this new environment poses to the consumer, the NTA membership, the entire travel and tourism industry, and ultimately, to the nation's economy.

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